On September 21, 2005, the California Supreme Court denied Petitioners' Petition for Review, or in the alternative, Request for Rehearing, summarily and without comment.

It should be noted that, as discussed below, Petitioners originally assumed that the patently improper denials of their Petition for Rehearing and their Petition for Review were isolated, or at least uncommon, occurrences. However, during the process of preparing this Petition for Writ of Certiorari, Petitioners' attorneys were able to ascertain, from the Westlaw legal research data base, court records which show that the California Courts of Appeal, and the California Supreme Court, are simply ignoring the *California Government Code* §68081 mandatory "rehearing" requirement. Of course, Petitioners have been unable to fully investigate this matter in the relatively short period of time Petitioners had to file this Petition for Writ of Certiorari. However, Petitioners are confident that Petitioners will be able to provide this Court with compelling, if not conclusive, evidence supporting Petitioners' allegations. In any event, at this point, Petitioners have ascertained the following.[2]

California Government Code §68081 came into effect in 1986.

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[2] The information set forth below is available at *www.westlaw.com* by simply selecting the "citing references" regarding *California Government Code* §68081. At the time Petitioners prepared this Petition, there were an amazing 1,540 reference citations to *California Government Code* §68081. Out of these 1,540 citing references, 1,141 of the citing references are "appellate petitions, notices and filings."

From 1986 to around 1996 or 1998, very few petitions for rehearing were filed based, at least in part, upon *California Government Code* §68081.

Similarly, up to approximately 1996 or 1998, very few petitions for review were filed with the California Supreme Court based, in part, upon *California Government Code* §68081.

Starting in approximately 1998, there was a huge increase in the number of petitions for rehearing and petitions for review that were filed based, in part, upon *California Government Code* §68081.

It appears that from 1998 to 2005, more that 540 petitions for rehearing have been filed with the various California Courts of Appeal based, in part, upon a claim that *California Government Code* §68081 required rehearing.[3]

It further appears that from 1998 to 2005, more than 325 petitions for review have been filed with the California Supreme Court based, in part, upon a claim that *California Government Code* §68081 required rehearing.[4]

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[3] At this point, Petitioners are only able to provide rough estimations. Also, Petitioners are unable to state how complete the information gathered by Westlaw is. It is quite possible that this estimate has been drastically understated. Particularly, if Westlaw has failed to catalog any substantial number of the petitions filed referencing *California Government Code* §68081. Further, a proper review of this information would include the actual reading of all of the petitions for review, and underlying documentation, to confirm the exact nature of the requests made in each of these petitions. Petitioners herein have reviewed a lot of these petitions so far, and Petitioners are able to represent to this Court that the number of petitions filed seeking rehearing based, in part, upon *California Government Code* §68081 since 1998 is extraordinarily large.

[4] Please see Footnote #3 above.

In 2004, the number of petitions for rehearing filed with the Court of Appeal, State of California, Fourth Appellate District (the Appellate District that heard the matter at issue herein), "spiked" up from 14 petitions for rehearing being filed in 2003 to 23 petitions for rehearing being filed in 2004.

Petitioners' research thus far indicates that the California Courts of Appeal and California Supreme Court rarely order rehearings pursuant to *California Government Code* §68081, even though rehearings are frequently requested.

The determination of whether or not a rehearing should be ordered pursuant to *California Government Code* §68081 in a particular matter can be objectively shown from court records – a simple comparison of the Appellate Court decision with the underlying briefs is all that is required.[5]

As set forth in detail below, the facts of this case establish, conclusively, that the procedures followed by the trial court, the Court of Appeal and the California Supreme Court resulted in the taking of Petitioners' property

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[5] In this regard, in *Dieckmeyer v. Redevelopment Agency of the City of Huntington Beach*, 18 Cal.Rptr.3d 871 (2004), the California Supreme Court held that the Appellate Court incorrectly concluded that no rehearing was required by *California Government Code* §68081 because "'the point was raised by the court at **oral argument**, explored extensively by both sides, and neither side requested the opportunity to submit supplemental briefing on the issue . . . was sufficient to comply with *California Government Code* §68081.'" Rather, *California Government Code* §68081 requires that "the issue on which the case was decided was fairly encompassed within the issues raised and addressed in the parties' **briefs**." (Bold emphasis added.) As such, an inquiry into what occurred at oral argument is not required. Rather, *California Government Code* §68081 requires an opportunity to be heard in writing so that arguments can be presented thoughtfully and fairly.

without due process, this includes the violation of the mandatory rehearing requirement set forth in *California Government Code* §68081. Petitioners believe that this Court should grant this Petition for Writ of Certiorari for this reason alone. However, Petitioners' Petition for Writ of Certiorari in unequivocally "compelling" because Petitioners are prepared to do the work necessary to present to this Court overwhelming and undisputable evidence demonstrating that the California Courts of Appeal and the California Supreme Court have been, for many years now, rendering decisions without providing the litigants an opportunity to be heard through the violation of the mandatory rehearing requirement set forth in *California Government Code* §68081.

REASONS FOR GRANTING THIS PETITION FOR WRIT OF CERTIORARI

As discussed in the "statement of facts" set forth above, the crux of this Petition is not simply Petitioner's claim that the Court of Appeal and California Supreme Court violated Petitioner's rights to due process and equal protection by "rendering a decision" "based on an issue which was not proposed or briefed by any party to the proceeding," and then by failing to give Petitioner an opportunity to be heard upon the timely filing of a Petition for Rehearing. Rather, the issue that distinguishes this Petition from the nine other Petitions previously filed with this Court claiming a violation of *California Government Code* §68081 (which Petitions this Court denied) is Petitioner's submission of objective evidence which shows that the California Courts of Appeal and California Supreme Court have violated the due process rights of hundreds of litigants, for more than six years, by systematically

refusing to order "rehearings" as required by *California Government Code* §68081.

In this regard, it is "Hornbook law" that, as a general proposition, a litigant's constitutional and statutory due process rights are violated when a matter is decided without giving the litigant an opportunity to be heard. *California Government Code* §68081 simply codifies this rather basic rule of law. As such, Petitioners believe that no purpose will be served to brief this rather basic issue of law at this point, absent a specific request from this Court.

As set forth below, it is undisputed that Petitioners' right to due process was violated by the California Court of Appeal and California Supreme Court when they failed to order a "rehearing" after the Court of Appeal rendered an opinion based upon issues which were not proposed or briefed by any party to the proceeding. Petitioners submit that this Petition for Writ of Certiorari should be granted simply because the California Court of Appeal and California Supreme Court violated Petitioners' due process rights and Petitioners are without any other remedy. However, it is well known that "a Petition for Writ of Certiorari will only be granted for compelling reasons." Therefore, in addition to the undisputed evidence supporting Petitioners' claim that Petitioners' due process rights were violated, Petitioners also submit objective evidence which shows the systematic violation of the due process rights of hundreds of litigants for many years, by the refusal of the California Courts to comply with the mandatory rehearing requirements set forth in *California Government Code* §68081. In this regard and as set forth above, Petitioners are confident that they can present conclusive evidence establishing this contention if a brief on the merits is allowed.

Therefore, the only thing that remains is to convince this Court that the systematic violation of the due process requirements embodied in *California Government Code* §68081 by the California courts presents a sufficiently compelling issue to warrant the attention of this Court, which is very busy. In this regard, Petitioners surmise that rehearings are not ordered by the California Courts as required by *California Government Code* §68081 because the judges do not have enough time or resources available to "rehear" matters which those judges sincerely believe were correctly decided. Also, the judges in California are under a huge amount of pressure to process cases within particular time periods. No matter what the cause is, the result is that the due process rights of hundreds of litigants have been violated, and these violations will continue into the future unless some action is taken. However, these due process violations would probably be substantially curtailed if this Court simply publishes an opinion addressing the problem – fires a shot over the bow.

Therefore, the rather simple and non-legalistic reason for granting this Petition is that by spending a small amount of time on a simple issue, this Court may be able to substantially remedy a large and continuing problem caused by a lack of time at the state court level. Otherwise, this Court's lack of time and resources will, like the state court's lack of time and resources has done, result in the continued violation of due process rights.

The remainder of this "Reasons for Granting This Petition for Writ of Certiorari" discusses the factual details and law regarding the matters at issue in the *Edwards v. Irvine Company* case, and sets forth, with particularity, how Petitioners' due process rights were violated. While these matters are certainly important, and should be

included in this Petition, the primary "compelling reasons" for granting this Petition are, admittedly, set forth above.

As discussed in the statement of facts set forth above, the Appellate Court's decision in this case was based on issues which were not proposed or briefed by any party. One issue that was raised "sua sponte" by the Appellate Court was compliance with the statute of frauds. For example, the Appellate Court's opinion states:

> "Under the statute of frauds, a deed must describe the interest being conveyed. Without a description, a deed is invalid. (See *Leoke v. County of San Bernardino* (1967) 249 Cal.App.2d 767, 772-772 [deed that described two mines but not a third did not convey the third].)" (RVACO:6.)

However, a review of the court's decision in *Leoke*, supra,[6] reveals that **the court in that case never even discussed the statute of frauds, whether a deed**

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[6] On the other hand, ironically, the opinion in *Leoke v. County of San Bernardino*, supra, did state, at page 773, in pertinent part:

> "In interpreting a deed, consideration should be given to the instrument as a whole, with due regard to every word and clause in light of the circumstances surrounding its execution. Plaintiff would single out words 'mineral surveying no. 3992' and ignore the descriptive names of the mines and section number, a mine may be conveyed by its own name. The known names of the mines were a significant part of the description and cannot be ignored." (Emphasis added. Citations omitted.)

The above statement from *Leoke v. County of San Bernardino*, supra, specifically conflicts with the statement in the Court of Appeal's opinion in this case that the numerous references in the 1878 Grant Deed "that the property was conveyed 'with the appurtenances' appears to be traditional conveyancer's boiler plate" and should, therefore, be ignored, and that the reference to "Rancho Lomas de Santiago" and other language in the Deed was, as a matter of law, "insufficient to describe the servient estate" (RVACO:7).

must describe the interest being conveyed, and the extent to which a deed, without a description, is invalid. While Petitioners have no idea where this erroneous legal citation came from, it is clear that it was not proposed by either of the parties.

Also, there is no simple rule of law that "a deed is invalid" "under the statute of frauds" if the deed does not "describe the interest being conveyed." This is because "there are so many exceptions to the statute of frauds that the exceptions have now eclipsed the rule." For example, the statute of frauds is not even applicable to "executed contracts." Of course, as set forth in the Court of Appeal's own statement of facts, the contract at issue herein was "executed" more than one hundred years ago. Therefore, the defense of the statute of frauds is not available.

Also, technically, a deed that does not comply with the requirements of the statute of frauds is "voidable," it is not "void" or "invalid," and the defense is waived if not timely asserted. In this case, Respondent never raised the issue of the statute of frauds as a defense. **In fact, the statute of frauds issue was never "proposed or briefed by any party." Rather, the statute of frauds issue was raised, for the first time, by the Court of Appeal.**[7]

Furthermore, because the Court of Appeal's opinion in this case is based upon several issues "which were not proposed or briefed by any party to the proceedings," Petitioners' right to due process was also violated.

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[7] Also, it would appear that because the Court of Appeal violated *California Government Code* §68081, the Court of Appeal also "lacked jurisdiction" as that term is used in *California Rules of Court*, Rule 28(b)(2) (although Petitioners are unaware of any law on this particular subject).

Another primary issue on appeal in this case regards the Court of Appeal's somewhat harsh statement:

> "Edwards appears to argue an easement was intended because a right-of-way easement may be appurtenant, and the mention of appurtenances in the deed creates such an easement. The argument borders on the frivolous." (Emphasis added.) (RVACO:6.)

The Court of Appeal then goes on to state, without citing any law whatsoever, that the references in the 1878 Grant Deed to "appurtenances" are "boilerplate," and should be ignored. In this regard, the Court of Appeal's accusation that Petitioners' claim that the reference to "appurtenances" in the 1878 Grant Deed refers to easements, "borders on frivolous," not only shows a lack of the mutual respect that should exist between the bar and the judiciary, it is also in direct conflict with California law, including, for example, the California Supreme Court's opinion in *Rubio Canon Land and Water Association v. Everetti*, 154 Cal. 29 (1908), at pages 32 and 33, and the numerous cases cited therein. Once again, the lack of proper consideration of the matters at issue herein by the Court of Appeal compels the conclusion that a rehearing is necessary, and that Petitioners were deprived of due process.

Another issue presented by this Petition is whether or not it is appropriate for the Court of Appeal to modify its opinions "pretextually" to avoid "the requirements imposed by *California Government Code* §68081 that **before** a Court of Appeal renders a decision based upon an issue which was not proposed or briefed by any party to the proceedings, the Court shall afford the parties an opportunity to present their views on the matter through supplemental

briefing." (See *Dieckmeyer v. Redevelopment Agency of the City of Huntington Beach*, 18 Cal.Rptr.3d 871 (2004).)

Another important issue presented in this case arises out of the Appellate Court's statement that:

> "Since we conclude no express easement was created, **and Edwards does not argue the evidence shows an easement arose by necessity, implication, prescription or any other theory**, the inescapable conclusion is that nonsuit was warranted. Since the court granted a motion for judgment, we turn to whether that was prejudicial." (Emphasis added.)

With regard to the above, even Respondent's Brief on Appeal and Respondent's Opposition to Petitioners' Petition for Rehearing admits that the issues of implied easement, easement by necessity and balancing of hardships were raised by Petitioners, although the express easement issue was certainly the primary subject of the debate between Petitioners and Respondent. Similarly, and ironically, the most extensive discussion in the Appellate Court's opinion regards Petitioners' reference to the California Supreme Court's decision in *Camp Meeker Water System v. Public Utilities Commission*, 51 Cal.3d 845 (1990). Of course, the *Camp Meeker* case is well known for its extensive and detailed discussion of the laws of "implied easements." The result being that Petitioners' Briefs, Respondent's Brief and the Appellate Court's decision, combined, devote more than ten pages to the discussion of the law of implied easements. As such, the issue of implied easement was "argued by Petitioners."

Similarly, Petitioners submitted an uncontradicted declaration of an expert engineer for the purposes of

establishing easement by necessity. Also, Petitioners presented evidence supporting the creation of an easement by prescription and pursuant to the doctrines of "balancing of hardships" or "estoppel." Clearly, while these issues were not the primary focus of attention by either Petitioners or Respondent, these issues were properly raised. Rather, it appears that the Court of Appeal got sidetracked in its consideration of matters which were not proposed or briefed by any party, and missed the fact that these issues were raised.

Another important issue presented in this case is the Court of Appeal's determination that the trial court's granting of Respondent's Motion for Nonsuit was "non-prejudicial." In this regard, and as set forth in detail below, this case was tried to the trial court using a stipulated procedure for the submission of evidence. As part of that procedure, it was agreed that Respondent could only bring a Motion for Nonsuit. However, instead of bringing a Motion for Nonsuit, Respondent brought a Motion for Judgment. Over Petitioners' objections, the trial court granted Respondent's Motion for Judgment, and denied Petitioners the procedural advantages for which Petitioners bargained.

While the Court of Appeal did agree that Respondent was limited to bringing a Motion for Nonsuit, the Court of Appeal found that the granting of the Motion for Judgment was not prejudicial, even though Petitioners lost substantial procedural rights. The Court of Appeal's opinion in this regard was based on the Court of Appeal's conclusion that "Edwards never described the evidence he sought to add or what defects it would cure in Edwards' request to reopen" (RVACO:8). **In this regard, please note that the issue of whether or not Petitioners'**

offer of proof in connection with Petitioners' request to reopen in response to Respondent's Motion for Nonsuit was not "proposed or briefed by any party to the proceeding." Rather, once again, the issue was raised by the Court of Appeal, sua sponte, for the first time on appeal. As such, rehearing was requested in Petitioners' Petition for Rehearing. However, this issue was not dealt with at all by the Court of Appeal in its Order Modifying Opinion and Denial of Petition for Rehearing.

Also, the Court of Appeal's conclusion that Petitioner "waived any right to reopen" by failing to provide a sufficient "offer of proof" to the trial court makes no sense because, under the circumstances, it was impossible for Petitioners to know what evidence needed to be presented.

As set forth above, in response to Petitioners' Petition for Rehearing, the Court of Appeal ordered the modification of its original opinion and denied Petitioners' Petition for Rehearing. However, given the cursory nature of the modifications, combined with the fact that the law set forth in the modifications was wrong and not supported by the authority referred to, the modifications made by the Court of Appeal appear to be merely "pretextual" and for the purpose of preventing further review and rehearing of the matters at issue herein. While Petitioners' concerns in this regard may or may not be justified, it is important for the integrity of the judicial process that the Court does not perpetuate these concerns.

With regard to the above, *California Government Code* §68081 states that "rehearing **shall** be ordered upon timely petition of any party" if the Court of Appeal "renders a decision in a proceeding . . . based upon an issue

which was not proposed or briefed by any party to the proceeding" (emphasis added). In this case, Petitioners and Respondent vigorously debated whether or not Petitioners were entitled to access the Black Star Coal Mine Property through Respondent's property by virtue of an "express" (or "implied") easement, with Respondent contending that "no such easement could exist because the 1878 Grant Deed: 1) failed to adequately describe the servient tenement; and 2) failed to adequately describe the use to which the servient tenement was to be subjected" (see, for example, Respondent's Brief at pages 17 and 18). Respondent's position in this regard was based upon the general rules of law stated in *City of Glendora v. Faus*, 148 Cal.App.2d 920, 926 (1957), that a writing granting an easement must contain:

> "1. The names of the grantors and grantees;
>
> 2. An adequate description **of the servient tenement** that is sufficient for identification;
>
> 3. An adequate description of the use to which the servient tenement is to be subjected." (Also see Respondent's Brief at pages 17 and 18, and Miller & Starr, *California Real Estate 3d* (2004), at §15:14.)

Accordingly, throughout the course of this case, the parties extensively "proposed and briefed" the issues of: whether or not the 1878 Grant Deed adequately described the servient tenement and the rules of law applicable to determining the scope and location of easements including rules regarding floating easements, etc. (Respondent admitted that the names of the grantor and grantee are set forth in the 1878 Grant Deed).

However, neither party ever discussed the entirely separate issue (apparently raised sua sponte, and for the first time, in the Appellate Court's Opinion) of whether or not the 1878 Grant Deed contains "**words of grant and a description of the interest granted**" (RVACO:5). In this regard, Petitioners respectfully submit that the reason this issue was never discussed is because there is no rule of law requiring that the intention to convey an easement appear in a grant deed **separate and apart from the general granting language**.[8] As discussed in detail below, the reasons for this are several. First, the term "express easement" merely refers to an easement which the parties had an intention to create. (See *Restatement of Property 3d*: Servitudes at §2.1.) As stated above, while express easements are commonly set forth in some sort of deed, or other writing, this is not an absolute requirement. Rather, **"express easements" can be created in writing, orally or even by conduct** as long as the requirements of the statute of frauds are satisfied (see *Miller & Starr*, supra, at §15:14 and *Restatement of Property 3d*, supra, at §2.1).[9] **As such, it appears that the issue being raised by the Court of Appeal in its decision in this case, for the first time, is actually a statute of frauds/parol evidence issue.**

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[8] This conclusion is supported by the fact that the Appellate Court's Opinion does not set forth any legal authority in support of this position.

[9] Similarly, an "implied easement" is an easement which is implied by law in situations where the intent of the parties cannot be shown, but because the easement existed before the transfer of the property, the law will imply that the easement was intended to continue subsequent to the transfer. Basically, the intent is inferred by law based upon the circumstances that existed at the time of the grant.

In this regard, the Court of Appeal's confusion regarding these admittedly complicated factual and legal issues is apparent from a close reading of pages 5-7 of the Court of Appeal's Opinion, which states:

> "Edwards argues the evidence is sufficient to show an express easement in the 1878 Irvine deed. **His theory is the reference to 'appurtenances' in the habendum clause of the deed created an easement.** We cannot agree.
>
> To convey an estate or interest in land, an instrument must contain words of conveyance indicating a present intent to transfer an identified interest. 'An instrument cannot be construed to be a deed, unless it contains operative words that are sufficient to manifest an intention to transfer title to an estate in the property described. A deed entirely lacking in words of grant passes no title. . . . No specific words need be used to long as they indicate to pass title. . . .' (2 Patton & Palomar on Land Titles, §343 (3d ed. 2003, fn. omitted).)
>
> Under the statute of frauds, a deed must describe the interest being conveyed. Without a description, a deed is invalid. (See *Leoke v. County of San Bernardino*, 249 Cal.App.2d 767, 772-772 (1967) [deed that described two mines but not a third did not convey the third].) Where the grant of an easement is claimed, the deed must describe both the use granted and the servient estate. (*City of Glendora v. Faus* (148 Cal.App.2d 920, 926.)
>
> **Deeds** are interpreted in the same manner as contracts (Civ. Code, §§ 1053, 1066.) **The primary object is to ascertain and carry out the parties' intent.** (See, e.g., *City of Manhattan*

Beach v. Superior Court, 13 Cal.4th 232, 238 (1996).)

We cannot find in the **naked reference to appurtenances** in the **habendum clause** either an **intention to convey an easement or any description of one**. An easement is the right to use the land of another, **so the inquiry must be whether the deed contains any language allowing Witte to use Irvine's surrounding land to reach his own.**[10] Nothing of the kind appears. The statement that the property was conveyed 'with the appurtenances' appears to be traditional conveyancer's boilerplate **to make sure that existing easements appurtenant to the estate granted were conveyed to the grantee. But Irvine did not have an existing easement benefiting the mine property to use other portions of his property for access, since one cannot possess an easement over his own land**. So the catch-all language does not create an easement.

Edwards appears to argue an easement was intended because a right-of-way easement may be appurtenant, and the mention of appurtenances in the deed creates such an easement. **The argument borders on frivolous.**[11]

The point relies on two statutory definitions. Civil Code section 662 provides something is appurtenant to land if 'by right used with land for

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[10] This statement fails to acknowledge the huge body of law allowing for the use of extrinsic evidence to establish an easement and allowing for the creation of easements by conduct and orally.

[11] Please note that this argument was originally accepted by the trial court when it denied Respondent's Motion for Summary Judgment.

its benefit.' Civil Code section 801 states that 'land burdens . . . may be attached to other land as . . . appurtenances, and are then called easements.' An ensuing list of 18 such easements includes a right-of-way.

That an easement may be appurtenant (as opposed to in gross, where it is personal to the owner) says nothing about whether one was created. And the argument proves too much. Easements appurtenant may be for many purposes. Some of those mentioned in Civil Code section 801, in addition to a right-of-way, are the right to pasture, fish, take game, take water or minerals, conduct sports, receive air, light or heat, the right to floor other land, and the right to natural support. If the boilerplate grant of appurtenances could create an easement, what easement is it?[12] All possible uses of the grantor's retained land? Some? Which ones? It is against this unworkable result that **we consider the rule that a deed is ineffective absent operative words of grant and a description of the interest granted.** As we have said, **no easement is mentioned or described in the Irvine Deed.**

Edwards also argues the Irvine deed describes the servient tenement in the recitation that it conveys "that certain portion of the Rancho Lomas de Santiago situate in Los Angeles County, California, and described as follows. . . ." His theory seems to be that the remainder of the Rancho Lomas de Santiago is the servient estate, and naming it suffices as a description of

[12] These matters are to be determined from the intent of the parties using extrinsic evidence. There is no rule that requires this to be contained in the Grant Deed.

> the servient estate. The point is meritless. The language in question describes the fee simple estate conveyed and nothing more. And since no easement was created, there can be no servient estate." (RVACO:5-7.)

As the portion of the Appellate Court's Opinion set forth above makes clear, the Appellate Court's decision in this matter was based upon the Appellate Court's determination that "**no intent to convey** an easement appears in the Irvine Deed," based on "the rule that a deed is ineffective absent operative words of grant indicating an intent to transfer an estate or interest in land." While it is true that, to be effective, grant deeds generally must contain words of grant indicating an intent to transfer, this is not a requirement, strictly speaking, applicable to the creation of easements. Rather, as even the Court of Appeal's decision acknowledges (at page 6), the question or whether or not an express easement is created is to be determined from the intention of the parties as expressed in their writings, agreements, representations and by their conduct. The question of whether or not particular evidence is admissible to establish this intent is typically governed by the parol evidence rule. And, the question of how much of this intention must be contained in a written document is governed by the law regarding the statute of frauds.

In this regard, **Respondent has never raised the statute of frauds as a defense** in this case, and this is a defense that is waived if not timely asserted (see *Miller & Starr*, §1:74). It would appear that the reason that the defense of the statute of frauds was never raised by Respondent is because to do so would have been futile. That is because it is well-established law that the statute

of frauds is not applicable to fully executed agreements (see *Miller & Starr*, supra, at Section 1:75, et seq.). Also, there are so many exceptions to the statute of frauds that it is often said that the "exceptions are more extensive than the rule." Furthermore, it would appear that the deed at issue herein does in fact satisfy the requirements of the statute of frauds, which are quite minimal. **In any case, this issue was not proposed or briefed by any party.**

It should be noted with regard to the above, that the determination of whether or not the parties "intended to convey an easement" is to be made by ascertaining the intent of the parties. To determine the intent of the parties, the courts often look to the parties' conduct, before any dispute arose, to see if that conduct evidences the existence of an easement. In this regard, sufficient evidence to defeat a motion for nonsuit is recited in the Appellate Court's Opinion (at page 2), wherein the court acknowledges the fact that in 1887, there existed "good roads" to the Black Star Coal Mine and over which "10 tons of coal per day was being hauled out."

Also, Petitioners would also like to point out the comment in the Appellate Court's Opinion (at page 6) that:

> "The statement that the property was conveyed 'with appurtenances' **appears to be traditional conveyancer's boilerplate to make sure that *existing* easements appurtenant to the estate granted were conveyed to the grantee**. But **Irvine did not have an existing easement benefiting the mine property** to use other portions of his property for access, **since one cannot possess an easement over his own land**. So this catch-all language does not create an easement."

Of course, it is well-established law that in interpreting a deed, the Court is to give meaning to all of the words set forth therein. As such, rather than summarily dismissing numerous references to "appurtenances" in the 1878 Grant Deed (in both the "granting clause" and in the "habendum clause") as being meaningless, "boilerplate" surplusage, the Court was supposed to attempt to give meaning to those terms.

Also, the Appellate Court's Opinion states that "Edwards is equally mistaken in relying on *Camp Meeker Water System v. Public Utilities Commission*, 51 Cal.3d 845 (1990), for the proposition that the words "rights appurtenant" create an easement. The Court goes on to state that in the *Camp Meeker* case, the words of "grant" are "water and water rights," not the words "rights appurtenant."

However, Petitioners do not rely on the *Camp Meeker Water System* case for the proposition that the words "rights appurtenant" express an intent to create an easement. **This is primarily because the issue of whether or not an intent to create an easement is stated in the 1878 Grant Deed has never been proposed or briefed by any party to this case.** (Instead, as discussed above, Petitioners rely upon cases like *Rubio*, supra, for this purpose.)

Rather, the purpose of Petitioners' extensive citation to the California Supreme Court's 1990 decision in the *Camp Meeker Water System* case is to provide a somewhat current authority which comprehensively discusses the law governing express easements and **easements by implication** in general, and the determination of the

"scope" of either an express (or an implied easement) when there is no document setting forth that information.

Petitioners do not, and never have, contended that the *Camp Meeker* case stands for the proposition that the words "rights appurtenant," by themselves, create an easement. Rather, as set forth in the Appellate Court's decision in this matter, and in the *Camp Meeker* case, and in essentially every authority on the point, **the determination of whether an easement has been created is to be made by looking at the intention of the parties** including their writings, their words and their conduct. Then, if this evidence does not support a finding that the parties "expressly" intended to create an easement, the next question is whether, from the circumstances surrounding the conveyance, should an easement "be implied."

In this regard, it should be noted, that the Appellate Court's Opinion in this case states, at pages 7 and 8, that **"Edwards does not argue the evidence shows an easement arose by necessity, implication, prescription or any other theory, the inescapable conclusion is that nonsuit was warranted."** This is also incorrect. As admitted in Respondents' Brief at pages 16-17, these issues have been raised, although not extensively argued (see discussion below). **In fact, the *Camp Meeker* decision contains an extensive discussion of the rules regarding implied easements and the differences between implied easement and express easements.**

In this regard, and as pointed out in the Appellate Court's Opinion (at page 4), the Irvine Company's only argument that no implied easement was based upon Respondent's claim that the element of "apparent and

continuous use prior to severance of title" could not be satisfied. However, as stated in the Appellate Court's Opinion (at page 2) prior to Irvine's sale of the Black Star Coal Mine Property to Witte, "there was a good road leading to the mine from Santiago Canyon, and ten tons of coal per day were being hauled out." As such, Petitioners have a viable claim of express easement.

In this regard, the Appellate Court's Opinion states, in pertinent part, commencing at page 9, as follows:

> "Without gainsaying the procedural differences between the two motions, allowing the motion for judgment was not prejudicial. The express easement issue turned solely on the wording of the Irvine deed, not declarations or deposition testimony, so the trial judge was not in a position to weigh the evidence. Moreover, our own review of the evidence under the nonsuit standard is a further bulwark against an improper weighing of the evidence.
>
> Nor was Edwards denied the right to reopen associated with a nonsuit motion. **That requires an offer of proof sufficient to cure the defects in the case.** Here, no additional proof was tendered to make up for the absence of words of conveyance in the Irvine deed. And the offer on other issues was insufficient, since Edwards never described the evidence he sought to add or what defects it would cure. The only substantive offer concerned the Ulrich declaration: 'Plaintiff can also offer other witnesses . . . who can testify to the same matters as to which Mr. Ulrich is testifying to.' That falls short of the required description of the evidence proffered and explanation of how it would cure defects in the case (*Alpert v. Villa Romano Homeowners Assn.*, supra,

81 Cal.App.4th 1320, 1337), so any right to reopen was waived.

Edwards also fails to demonstrate any prejudicial vagueness in the grounds set forth in the motion. He argues the motion did not present concise grounds for nonsuit, but without any discussion of what was asserted or how it was lacking. That fails to carry the appellant's burden to affirmatively demonstrate error. (*Jacques Interiors v. Petrak*, 188 Cal.App.3d 1363, 1369 (1987).) So granting the unauthorized motion for judgment was harmless error, since the record supports the granting of the agreed upon motion for nonsuit." (RVACO:9-10.) (Emphasis added.)

With regard to the above, the issue of whether or not Petitioners' offer of proof in connection with Petitioners' request to reopen in response to Respondent's Motion for Non-Suit was not "proposed or briefed by any party to the proceeding." **Rather, this issue was raised by the Court of Appeal, sua sponte, for the first time on appeal.** As such, rehearing is required. In this regard, Petitioners would like to point out that the Court's analysis set forth above "puts the cart before the horse."

As set forth in Eisenberg, Horvitz and Weiner, *California Practice Guide*: Civil Appeals and Writs (TRG 2004), the purpose of the requirements that the grounds for a motion for non-suit be set forth concisely and with specificity, and the rule that the Court of Appeal cannot consider issues which were not set forth in the motion for non-suit, is to alert the plaintiff of the deficiencies in the plaintiff's case and to give the plaintiff an opportunity to cure those deficiencies.

In this case, no grounds were set forth in Respondent's Motion for Non-Suit because Respondent claimed to have made a Motion for Judgment. As a result, Respondent's Motion for Non-Suit did not specify any particular problems with the evidence presented by Petitioners. Therefore, the Court never identified any problems with the evidence presented by Petitioners, and Petitioners had no ability to know what evidence Petitioners needed to proffer to cure the defects in Petitioners' case. Simply put, the "prejudice suffered by Petitioners" as a result of the "vagueness in Respondent's Motion," and the vagueness in the Court's ruling on that Motion, was the complete inability of Petitioners to identify what evidence Petitioners needed to proffer to cure the defects in Petitioners' case. In fact, under the circumstances of this case, the prejudice to Petitioners was so severe that it literally resulted in depriving Petitioners of due process.

In any event, because this issue was never proposed or briefed by any party to this proceeding, rehearing is required.

In addition to all of the above, for the purpose of clarity, Petitioners would like to point out the following:

First, as admitted in Respondent's Brief, and as stated in the Appellate Court's Opinion, the issues of implied easement, easement by necessity and balancing of hardships were raised by Petitioners, although these issues have never been extensively discussed. The reason these issues were never extensively discussed is that, absent an understanding of what evidence was on the table, it was almost impossible to argue any of these theories with any specificity.

However, now that it has been determined that Respondent's Motion was in fact a Motion for Non-Suit, Petitioners would like to again point out that Petitioners submitted the Declaration of Petitioners' Expert Engineer, Riley Clark. That Declaration, when viewed in the light most favorable to Petitioners, establishes an easement by necessity.

Similarly, as discussed above, there were roads going through the Irvine Ranch Property to the Black Star Coal Mine Property prior to the conveyance of the Black Star Coal Mine Property. Therefore, facts sufficient to establish an implied easement exist.

Also, the facts proffered by Petitioners support the granting of some kind of easement by way of balancing of hardships or estoppel. This would allow for the safe access to and from Petitioners' property in the event of fire.

Further, as recited in the Court of Appeal's own Statement of Facts, there exists evidence to establish an easement by prescription.

The bottom line is, as a result of the procedures employed by the trial court, Petitioners never had a chance to present Petitioners' case in a fair manner.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

DATE: 12/09/2005

Respectfully submitted,

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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

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IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ANDREW C. EDWARDS, as Trustee, etc., Plaintiff and appellant, v. THE IRVINE COMPANY, Defendant and Respondent.	G033700 (Super. Ct. No. 02CC18992) OPINION (Filed Jun. 17, 2005)

Appeal from a judgment of the Superior Court of Orange County, Steven L. Perk, Judge. Affirmed.

Law Offices of Steven J. Eichberg, Steven J. Eichberg and Steven G. Cohn, for Plaintiff and Appellant.

Green & Hall, Robert L. Green and John T. Griffin, for Defendant and Respondent.

This is an action to establish an easement over lands owned by The Irvine Company. Andrew C. Edwards, as Trustee of the Andrew C. Edwards Trust and Andrew C. Edwards (Edwards) appeal from the trial court's entry of a

judgment against them. They argue the evidence was sufficient to make out an easement, the motion for judgment violated a pretrial order that allowed only a motion for nonsuit, and it was error to deny a request for a statement of decision. We disagree and affirm.

* * *

In 2001, Edwards acquired the former Black Star Coal Mine property in the Santa Ana Mountains.[1] It is surrounded on three sides by lands of The Irvine Company and on the fourth by the Cleveland National Forest. The property is accessible via Black Star Canyon Road, a county road that is no longer maintained and is open only to owners and occupiers of adjacent land. However, access from Black Star Canyon Road is limited to a small portion of the property (the lower portion) that is cut off from the remainder of the parcel due to steep terrain. Edwards claims a more convenient easement over an old mining road that traverses The Irvine Company's property. It leads to the former mine site on a part of the property (the upper portion) that is suitable for building a home. Hence, this action.

The Black Star Coal Mine dates to 1877, when one August Witte discovered coal deposits and filed a possessory mining claim. According to articles in the Anaheim Gazette in October and November, 1877, there was a good road leading to the mine from Santiago Canyon, and ten tons of coal per day were being hauled out. By that time,

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[1] In light of Edwards' claim the pretrial order permitted only a motion for nonsuit, we consider the evidence under that standard. Accordingly, we view the evidence, and all legitimate inferences from it, most favorably to Edwards. (*CC-California Plaza Associates v. Paller & Goldstein* (1996) 51 Cal.App.4th 1042, 1050.)

James Irvine had assembled a large ranch in the area that included the mine site.

In 1878, Witte and others (collectively referred to here as Witte) acquired title to the mine property from Irvine. The deed recites that Irvine, as party of the first part, "does grant, bargain and sell, convey and confirm unto the said parties of the second part and to their heirs and assigns forever . . . that certain portion of the Ranch Lomas de Santiago situate in Los Angeles County, State of California, and described as follows [a meets and bounds description follows]. . . . [¶] Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appurtaining . . . and also all the estate, right, title, interest . . . of the said party of the first part of in or to the above described premises, and every part and parcel thereof with the appurtenances. To have and to hold, all and singular, the above mentioned and described premises together with the appurtenances, unto the said parties of the second part, their heirs and assigns forever."

In 1879, Witte conveyed the property to the Black Star Coal Mining Company. It passed by mesne conveyances in 1926 to Myers Electrical Supply Company. Sometime in the late 1920's or 1930, Black Star Canyon Road was constructed. After further intervening conveyances, the property was purchased in 1954 by Donald and Gladys Ulrich. They later transferred the property to a family trust. In 2001, Edwards purchased the property from the Ulrich trust.

Dean Ulrich, son of the former owners, submitted a declaration saying his family typically had reached the upper portion of the property by crossing The Irvine

Company land over the old mining road and a smaller path he described as a trail. Maintenance on the mining road was irregular. When it was maintained, the Ulrichs were able to drive to the upper property; otherwise they had to make the journey on foot. Although The Irvine Company fenced the mining road, Ulrich and his family always believed they had a right to use it for access. Several years ago, Ulrich had the road cleared and used it a few times a year to visit the upper property. Once, a guard stopped Ulrich and said he was trespassing. He responded that his family had used the road since they bought the property, and he apparently went on his way unhindered. In a later meeting, representatives of The Irvine Company told Ulrich he could not use the road without an entry permit and demanded he sign certain unnamed documents. Ulrich refused and continued to use the road as before.

The complaint sets out four causes of action. The first is to quiet title to an easement on several theories. The primary claim is an express right-of-way easement in the Irvine deed, which plaintiff interprets to allow access for all reasonable purposes, including normal development. Alternative claims are an easement by implication, necessity, prescription, estoppel, and numerous other doctrines. The remaining causes of action are for declaratory relief (an easement exists), an injunction to prevent interference with the easement, and damages for trespass upon the easement.

A December 1, 2003 minute order states "court and counsel conferred in chambers regarding stipulation to trial by brief and direct testimony. . . ." It goes on to set a briefing and motion schedule: Plaintiff's trial brief by December 10, 2003, defendants "motion for non-suit (or

trial brief)" by December 17, 2003, and plaintiff's opposition by December 19, 2003. The order states that five days after notice of ruling "on defendant's motion for nonsuit," defendant's trial brief will be due. Two days after that, "the parties need to elect to call expert witnesses."

Edwards filed an "initial statement of facts and evidence" indicating what he intended to prove. It was accompanied by supporting documentary evidence, declarations, and deposition excerpts. The relevant portions are as set out above.

The Irvine Company responded with a motion for judgment (Code Civ. Proc., § 631.8) and extensive objections to the proffered evidence. The motion argued the 1878 Irvine deed did not create an express easement, and Edwards had not offered admissible evidence of an easement by any other theory. Alternatively, if the evidence was admissible, The Irvine Company argued any easement by necessity expired when Black Star Canyon Road provided alternate access, there was no implied easement because one of the elements could not be satisfied (apparent and continuous use prior to severance of title), and a prescriptive easement failed for lack of adverse and hostile use by the Ulrichs.

Edwards' reply objected that the motion for judgment violated the pretrial order, which authorized only a motion for nonsuit (Code Civ. Proc., § 581c), and he also argued there were no grounds for a nonsuit because the evidence was sufficient to show he had an express easement. If the court did grant a nonsuit, he requested leave to reopen. Edwards stated he could submit additional evidence to cure The Irvine Company's various evidentiary objections, but he did not describe the evidence. Edwards also said he

could offer other witnesses who could testify to the same matters as Ulrich, but again the evidence was not set out.

In a February 3, 2004 minute order, the trial judge granted the motion. He said no viable theory for an easement was shown, without further explanation. There was no ruling on the evidentiary objections. On February 17, 2004, Edwards filed a request for a statement of decision. In denying the request, the judge said the evidentiary portion of the trial lasted less than one court day and no statement of decision was requested when the matter was submitted. He added the request was also untimely for having been made more than 10 days after the ruling was issued.

I

Edwards argues the evidence is sufficient to show an express easement in the 1878 Irvine deed. His theory is the reference to "appurtenances" in the *habendum* clause of the deed created an easement. We cannot agree.

To convey an estate or interest in land, an instrument must contain words of conveyance indicating a present intent to transfer an identified interest. "An instrument cannot be construed to be a deed, unless it contains operative words that are sufficient to manifest an intention to transfer title to an estate in the property described. A deed entirely lacking in words of grant passes no title. . . . No specific words need be used so long as they indicate an intention to pass title. . . ." (2 Patton & Palomar on Land Titles, § 343 (3d ed. 2003, fn.omitted).)

Deeds are interpreted in the same manner as contracts. (Civ.Code, §§ 1053, 1066.) The primary objective is

to ascertain and carry out the parties' intent. (See, e.g., *City of Manhattan Beach v. Superior Court* (1996) 13 Cal.4th 232, 238.)

We cannot find in the naked reference to appurtenances in the habendum clause either an intention to convey an easement or any description of one.[2] An easement is the right to use the land of another, so the inquiry must be whether the deed contains any language allowing Witte to use Irvine's surrounding land to reach his own. Nothing of the kind appears. The statement that the property was conveyed "with the appurtenances" appears to be traditional conveyancer's boilerplate to make sure that *existing* easements appurtenant to the estate granted were conveyed to the grantee. But Irvine did not have an existing easement benefiting the mine property to use other portions of his property for access, since one cannot possess an easement over his own land. So this catch-all language does not create an easement.

Edwards argues the Irvine deed describes an easement because a right-of-way easement may be appurtenant, and the mention of appurtenances in the deed creates such an easement. The argument borders on the frivolous.

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[2] Historically, deeds contained several parts – premises, habendum and tenendum, reddendum, restrictions, and testimonium. The premises contained the names of the parties, words of grant, and a description of the property. (2 Patton & Palomar on Land Titles, § 334 (3d ed. 2003).) The habendum ("to have and to hold") stated the duration of the estate granted, at a time when naming the grantee did not convey a fee simple, and it described the purpose of the conveyance. (14 Powell on Real Property (1949), § 81A.04[1][d] at pp. 81A-53, 54.)

The point relies on two statutory definitions. Civil Code section 662 provides something is appurtenant to land if "by right used with the land for its benefit." Civil Code section 801 states that "land burdens . . . may be attached to other land as . . . appurtenances, and are then called easements." An ensuing list of 18 such easements includes a right-of-way.

That an easement may be appurtenant (as opposed to in gross, where it is personal to the owner) says nothing about whether one was created. And the argument proves too much. Easements appurtenant may be for many purposes. Some of those mentioned in Civil Code section 801, in addition to a right-of-way, are the right to pasture, fish, take game, take water or minerals, conduct sports, receive air, light or heat, the right to flood other land, and the right to natural support. If the boilerplate grant of appurtenances could create an easement, what easement did the parties contemplate? All possible uses of the grantor's retained land? Some? Which ones? It is against this unworkable result that we consider the rule that a deed is ineffective absent operative words of grant indicating an intent to transfer an estate or interest in land. As we have said, no intent to convey an easement in the Irvine deed.

Edwards is equally mistaken in relying on *Camp Meeker Water System, Inc. v. Public Utilities Com.* (1990) 51 Cal.3d 845 for the proposition the words "rights appurtenant" create an easement. In *Camp Meeker,* a deed conveyed lands used for a water system, along with "'easements had, used, and enjoyed in the operation of said [s]ystem, and also all water and water rights appurtenant to said [s]ystem and used or useful in its operations.'" (*Id.* at p. 865.) The court held the deed included an

easement appurtenant to the property conveyed, for the purpose of developing water sources on other lands of the grantor. (*Id.* at pp. 864-865.) Edwards' suggestion the operative language is "rights appurtenant" demonstrates that he misunderstands the case. Those are not the words that show an intent to convey the right to take water. Rather, it is the grant of "all water and water rights" "useful" in operation of the water system on the land conveyed, which express that intent. And the present deed clearly lacks any comparable language.

Since we conclude no express easement was created, and Edwards does not argue the evidence shows an easement arose by necessity, implication, prescription or any other theory, the inescapable conclusion is that nonsuit was warranted.[3] Since the court granted a motion for judgment, we turn to whether that was prejudicial.

II

Edwards argues the motion for judgment violated the pretrial order and denied him procedural advantages of a nonsuit motion. He is right about the violation, but the error was harmless since the record supports the granting of a nonsuit.

The pretrial order states that under the procedure stipulated to by the parties, The Irvine Company could respond to Edwards' trial brief with either a motion for nonsuit or a trial brief. There is no mention of a motion for

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[3] Because we conclude no easement was created, we do not consider Edwards' argument that an easement cannot be terminated by nonuse without proof of intent to abandon it, nor his contentions regarding the scope of the easement claimed.

judgment. So it is clear the motion for judgment was not authorized under the particular procedure set out in the pretrial order.

It is true there are major differences between a motion for nonsuit and one for judgment. A motion for nonsuit may be made only after the plaintiff has completed his opening statement in a nonjury trial. (Code Civ. Proc., § 581c, subd. (a).) The inquiry is whether plaintiff has made out a prima facie case. The moving party must clearly and particularly indicate the defects in the plaintiff's case, so the latter has the opportunity to cure them. (*John Norton Farms, Inc. v. Todagco* (1981) 124 Cal.App.3d 149, 161.) In ruling, the trial judge must give the evidence all its legal value, and indulge all inferences in favor of the plaintiff. (*CC-California Plaza Associates v. Paller & Goldstein, supra,* 51 Cal.App.4th 1042, 1050.) It has been said that after the motion is made, the trial judge must grant a request to reopen to offer further evidence (*Huang v. Garner* (1984) 157 Cal.App.3d 404, 416), but this right is waived unless the request is accompanied by an offer of proof that describes the evidence proffered and explains how it would cure the defects in the case. (*Alpert v. Villa Romano Homeowners Assn.* (2000) 81 Cal.App.4th 1320, 1337.)

On the other hand, a motion for judgment may be made in a nonjury trial after one side has completed its presentation of evidence. The trial court is to weigh the evidence, and the right to reopen is limited to rebutting adverse evidence and rehabilitating witnesses whose credibility has been attacked. (Code Civ. Proc., § 631.8, subd (a).)

Without gainsaying the procedural differences between the two motions, allowing the motion for judgment was not prejudicial.[4] The express easement issue turned solely on the wording of the Irvine deed, not declarations or deposition testimony, so the trial judge was not in a position to weigh the evidence. Moreover, our own review of the evidence under the nonsuit standard is a further bulwark against an improper weighing of the evidence.

Nor was Edwards denied the right to reopen associated with a nonsuit motion. That requires an offer of proof sufficient to cure the defects in the case. Here, no additional proof was tendered to make up for the absence of words of conveyance in the Irvine deed. And the offer on other issues was insufficient, since Edwards never described the evidence he sought to add or what defects it would cure. The only substantive offer concerned the Ulrich declaration: "Plaintiff can also offer other witnesses . . . who can testify to the same matters as to which Mr. Ulrich is testifying to." That falls far short of the required description of the evidence proffered and explanation of how it would cure defects in the case (*Alpert v. Villa Romano Homeowners Assn., supra,* 81 Cal.App.4th 1320, 1337), so any right to reopen was waived.

Edwards also fails to demonstrate any prejudicial vagueness in the grounds set forth in the motion. He

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[4] Although the motion was labeled as one for judgment, in fact it was something of a cross between a motion for nonsuit and a motion for judgment. Edwards' initial statement of facts amounted to an opening statement (at the bottom of the page, it is labeled as just that) but it was accompanied by evidence, so technically it was too late for a nonsuit motion. On the other hand, since the pretrial order contemplated additional expert testimony if The Irvine Company's motion was denied, a motion for judgment was premature.

argues the motion did not present concise grounds for nonsuit, but without any discussion of what was asserted or how it was lacking. That fails to carry the appellant's burden to affirmatively demonstrate error. (*Jacques Interiors v. Petrak* (1987) 188 Cal.App.3d 1363, 1369.) So granting the unauthorized motion for judgment was harmless error, since the record supports the granting of the agreed upon motion for nonsuit.

III

Finally, Edwards contends the judgment must be reversed because the trial judge denied his request for a statement of decision. He is mistaken.

A statement of decision must be issued if requested "within 10 days after the court announces a tentative decision unless the trial is concluded within one calendar day or in less than eight hours over more than one day in which event the request must be made prior to submission of the matter for decision." (Code Civ. Proc., § 632.) A statement of decision requested after trial is properly denied if the trial judge finds trial lasted less than 8 hours and the appellant fails to offer contrary evidence. (*In re Marriage of Gray* (2002) 103 Cal.App.4th 974.)

Here, no statement of decision was required. The request was not made until after the ruling on the motion. In denying it, the trial judge found "the evidentiary portion of trial lasted less than one court day." Because an order is presumed correct, and Edwards has not offered any evidence to show a longer trial, the request for a statement of decision was properly denied.

Since the evidence does not establish an express easement, allowing the motion for judgment was harmless error, and no statement of decision was required, the judgment must be affirmed. Respondent is entitled to costs on appeal.

BEDSWORTH, J.

WE CONCUR:

RYLAARSDAM, ACTING P.J.

MOORE, J.

"REDLINE" VERSION OF APPELLATE COURT'S OPINION SHOWING THE MODIFICATIONS MADE BY THE APPELLATE COURT IN RESPONSE TO APPELLANTS' PETITION FOR REHEARING

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

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OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

ANDREW C. EDWARDS, etc.,	
Plaintiff and Appellant,	G033700
v.	(Super. Ct. No. 02CC18992)
THE IRVINE COMPANY,	OPINION
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This is an action to establish an easement over lands owned by The Irvine Company. Andrew C. Edwards, as Trustee of the Andrew C. Edwards Trust and Andrew C. Edwards (Edwards) appeal from the trial court's entry of a judgment against them. They argue the evidence was sufficient to make out an easement, the motion for judgment violated a pretrial order that allowed only a motion for nonsuit, and it was error to deny a request for a statement of decision. We disagree and affirm.

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In 2001, Edwards acquired the former Black Star Coal Mine property in the Santa Ana Mountains.[1] It is surrounded on three sides by lands of The Irvine Company and on the fourth by the Cleveland National Forest. The property is accessible via Black Star Canyon Road, a county road that is no longer maintained and is open only to owners and occupiers of adjacent land. However, access from Black Star Canyon Road is limited to a small portion of the property (the lower portion) that is cut off from the remainder of the parcel due to steep terrain. Edwards claims a more convenient easement over an old mining road that traverses The Irvine Company's property. It leads to the former mine site on a part of the property (the upper portion) that is suitable for building a home. Hence, this action.

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[1] In light of Edwards' claim the pretrial order permitted only a motion for nonsuit, we consider the evidence under that standard. Accordingly, we view the evidence, and all legitimate inferences from it, most favorably to Edwards. (*CC-California Plaza Associates v. Paller & Goldstein* (1996) 51 Cal.App.4th 1042, 1050.)

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I

Edwards argues the evidence is sufficient to show an express easement in the 1878 Irvine deed. His theory is the reference to "appurtenances" in the *habendum* clause of the deed created an easement. We cannot agree.

To convey an estate or interest in land, an instrument must contain words of conveyance indicating a present intent to transfer an identified interest. "An instrument cannot be construed to be a deed, unless it contains operative words that are sufficient to manifest an intention to transfer title to an estate in the property described. A deed entirely lacking in words of grant passes no title. . . . No specific words need be used so long as they indicate an

intention to pass title. . . ." (2 Patton & Palomar on Land Titles, § 343 (3d ed. 2003, fn. omitted).)

Under the statute of frauds, a deed must describe the interest being conveyed. Without a description, a deed is invalid. (See *Leoke v. County of San Bernardino* (1967) 249 Cal.App.2d 767, 772-772 [deed that described two mines but not a third did not convey the third].) Where the grant of an easement is claimed, the deed must describe both the use granted and the servient estate. (*City of Glendora v. Faus* (148 Cal.App.2d 920, 926.)

Deeds are interpreted in the same manner as contracts (Civ. Code, §§ 1053, 1066.) The primary objective is to ascertain and carry out the parties' intent. (See, e.g., *City of Manhattan Beach v. Superior Court* (1996) 13 Cal.4th 232, 238.)

We cannot find in the naked reference to appurtenances in the habendum clause either an ~~any~~ intention to convey an easement or any description of one.[2] An easement is the right to use the land of another, so the inquiry must be whether the deed contains any language allowing Witte to use Irvine's surrounding land to reach his own. Nothing of the kind appears. The statement that the property was conveyed "with the appurtenances" appears to be traditional conveyancer's boilerplate to make sure

---

[2] Historically, deeds contained several parts – premises, habendum and tenendum, reddendum, restrictions, and testimonium. The premises contained the names of the parties, words of grant, and a description of the property. (2 Patton & Palomar on Land Titles, § 334 (3d ed. 2003.) The habendum ("to have and to hold") stated the duration of the estate granted, at a time when naming the grantee did not convey a fee simple, and it described the purpose of the conveyance. (14 Powell on Real Property (1949), § 81A.04[1][d] at pp. 81A-53, 54.)

that *existing* easements appurtenant to the estate granted were conveyed to the grantee. But Irvine did not have an existing easement benefiting the mine property to use other portions of his property for access, since one cannot possess an easement over his own land. So this catch-all language does not create an easement.

Edwards appears to argue an easement was intended because a right-of-way easement may be appurtenant, and the mention of appurtenances in the deed creates such an easement. The argument borders on the frivolous.

The point relies on two statutory definitions. Civil Code section 662 provides something is appurtenant to land if "by right used with the land for its benefit." Civil Code section 801 states that "land burdens . . . may be attached to other land as . . . appurtenances, and are then called easements." An ensuing list of 18 such easements includes a right-of-way.

That an easement may be appurtenant (as opposed to in gross, where it is personal to the owner) says nothing about whether one was created. And the argument proves too much. Easements appurtenant may be for many purposes. Some of those mentioned in Civil Code section 801, in addition to a right-of-way, are the right to pasture, fish, take game, take water or minerals, conduct sports, receive air, light or heat, the right to flood other land, and the right to natural support. If the boilerplate grant of appurtenances could create an easement, what easement ~~did the parties contemplate~~ is it? All possible uses of the grantor's retained land? Some? Which ones? It is against this unworkable result that we consider the rule that a deed is ineffective absent operative words of grant ~~indicating an intent to transfer an estate or~~ and a description of

the interest ~~in land~~ granted. As we have said, no ~~intent to convey an~~ easement ~~appears~~ is mentioned or described in the Irvine deed.

Edwards also argues the Irvine deed describes the servient tenement in the recitation that it conveys "that certain portion of the Rancho Lomas de Santiago situate in Los Angeles County, California, and described as follows. . . ." His theory seems to be that the remainder of the Rancho Lomas de Santiago is the servient estate, and naming it suffices as a description of the servient estate. The point is meritless. The language in question describes the fee simple estate conveyed and nothing more. And since no easement was created, there can be no servient estate.

Edwards is equally mistaken in relying on *Camp Meeker Water System, Inc. v. Public Utilities Com. (1990)* 51 Cal.3d 845 for the proposition the words "rights appurtenant" create an easement. In *Camp Meeker,* a deed conveyed lands used for a water system, along with "'easements had, used, and enjoyed in the operation of said [s]ystem, and also all water and water rights appurtenant to said [s]ystem and used or useful in its operations.'" (*Id.* at p. 865.) The court held the deed included an easement appurtenant to the property conveyed, for the purpose of developing water sources on other lands of the grantor. (*Id.* at pp. 864-865.) Edwards' suggestion the operative language is "rights appurtenant" demonstrates that he misunderstands the case. Those are not the words that ~~show an intent to convey~~ describe the right to take water. Rather, it is accomplished by the grant of "all water and water rights" "useful" in operation of the water system on the land conveyed, ~~which express that intent~~ that

creates the easement. And the present deed clearly lacks any comparable language.

Since we conclude no express easement was created, and Edwards does not argue the evidence shows an easement arose by necessity, implication, prescription or any other theory, the inescapable conclusion is that nonsuit was warranted.[3] Since the court granted a motion for judgment, we turn to whether that was prejudicial.

II

Edwards argues the motion for judgment violated the pretrial order and denied him procedural advantages of a nonsuit motion. He is right about the violation, but the error was harmless since the record supports the granting of a nonsuit.

The pretrial order states that under the procedure stipulated to by the parties, The Irvine Company could respond to Edwards' trial brief with either a motion for nonsuit or a trial brief. There is no mention of a motion for judgment. So it is clear the motion for judgment was not authorized under the particular procedure set out in the pretrial order.

It is true there are major differences between a motion for nonsuit and one for judgment. A motion for nonsuit may be made only after the plaintiff has completed his opening statement in a nonjury trial. (Code Civ. Proc.,

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[3] Because we conclude no easement was created, we do not consider Edwards' argument that an easement cannot be terminated by nonuse without proof of intent to abandon it, nor his contentions regarding the scope of the easement claimed.

§ 581c, subd. (a).) The inquiry is whether plaintiff has made out a prima facie case. The moving party must clearly and particularly indicate the defects in the plaintiff's case, so the latter has the opportunity to cure them. (*John Norton Farms, Inc. v. Todagco* (1981) 124 Cal.App.3d 149, 161.) In ruling, the trial judge must give the evidence all its legal value, and indulge all inferences in favor of the plaintiff. (*CC-California Plaza Associates v. Paller & Goldstein, supra,* 51 Cal.App.4th 1042, 1050.) It has been said that after the motion is made, the trial judge must grant a request to reopen to offer further evidence (*Huang v. Garner* (1984) 157 Cal.App.3d 404, 416), but this right is waived unless the request is accompanied by an offer of proof that describes the evidence proffered and explains how it would cure the defects in the case. (*Alpert v. Villa Romano Homeowners Assn.* (2000) 81 Cal.App.4th 1320, 1337.)

On the other hand, a motion for judgment may be made in a nonjury trial after one side has completed its presentation of evidence. The trial court is to weigh the evidence, and the right to reopen is limited to rebutting adverse evidence and rehabilitating witnesses whose credibility has been attacked. (Code Civ. Proc., § 631.8, subd (a).)

Without gainsaying the procedural differences between the two motions, allowing the motion for judgment was not prejudicial.[4] The express easement issue turned

[4] Although the motion was labeled as one for judgment, in fact it was something of a cross between a motion for nonsuit and a motion for judgment. Edwards' initial statement of facts amounted to an opening statement (at the bottom of the page, it is labeled just as that) but it was accompanied by evidence, so technically it was too late for a

(Continued on following page)

solely on the wording of the Irvine deed, not declarations or deposition testimony, so the trial judge was not in a position to weigh the evidence. Moreover, our own review of the evidence under the nonsuit standard is a further bulwark against an improper weighing of the evidence.

Nor was Edwards denied the right to reopen associated with a nonsuit motion. That requires an offer of proof sufficient to cure the defects in the case. Here, no additional proof was tendered to make up for the absence of words of conveyance in the Irvine deed. And the offer on other issues was insufficient, since Edwards never described the evidence he sought to add or what defects it would cure. The only substantive offer concerned the Ulrich declaration: "Plaintiff can also offer other witnesses . . . who can testify to the same matters as to which Mr. Ulrich is testifying to." That falls far short of the required description of the evidence proffered and explanation of how it would cure defects in the case (*Alpert v. Villa Romano Homeowners Assn., supra*, 81 Cal.App.4th 1320, 1337), so any right to reopen was waived.

Edwards also fails to demonstrate any prejudicial vagueness in the grounds set forth in the motion. He argues the motion did not present concise grounds for nonsuit, but without any discussion of what was asserted or how it was lacking. That fails to carry the appellant's burden to affirmatively demonstrate error. (*Jacques Interiors v. Petrak* (1987) 188 Cal.App.3d 1363, 1369.) So

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nonsuit motion. On the other hand, since the pretrial order contemplated additional expert testimony if The Irvine Company's motion was denied, a motion for judgment was premature.

granting the unauthorized motion for judgment was harmless error, since the record supports the granting of the agreed upon motion for nonsuit.

III

Finally, Edwards contends the judgment must be reversed because the trial judge denied his request for a statement of decision. He is mistaken.

A statement of decision must be issued if requested "within 10 days after the court announces a tentative decision unless the trial is concluded within one calendar day or in less than eight hours over more than one day in which event the request must be made prior to submission of the matter for decision." (Code Civ. Proc., § 632.) A statement of decision requested after trial is properly denied if the trial judge finds trial lasted less than 8 hours and the appellant fails to offer contrary evidence. (*In re Marriage of Gray* (2002) 103 Cal.App.4th 974.)

Here, no statement of decision was required. The request was not made until after the ruling on the motion. In denying it, the trial judge found "the evidentiary portion of trial lasted less than one court day." Because an order is presumed correct, and Edwards has not offered any evidence to show a longer trial, the request for a statement of decision was properly denied.

Since the evidence does not establish an express easement, allowing the motion for judgment was harmless

error, and no statement of decision was required, the judgment must be affirmed. Respondent is entitled to costs on appeal.

BEDSWORTH, J.

WE CONCUR:

RYLAARSDAM, ACTING P.J.

MOORE, J.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ANDREW C. EDWARDS, as Trustee, etc., Plaintiff and Appellant, v. THE IRVINE COMPANY, Defendant and Respondent.	G033700 (Super. Ct. No. 02CC18992) ORDER MODIFYING OPINION AND DENIAL OF PETITION FOR REHEARING; NO CHANGE IN JUDGMENT (Filed Jul. 18, 2005)

It is hereby ordered that the opinion filed herein on June 17, 2005, be modified as set out below. In reaching this conclusion, we have not considered the non-published decision cited by The Irvine Company in its answer to the petition for rehearing, since such decisions may not be cited or relied on by a party, subject to exceptions not applicable here. (Cal. Rules of Court, rule 977.)

The opinion filed June 17, 2005 is modified in the following particulars:

On page 5, delete all of section I and replace with the following:

"I

Edwards argues the evidence is sufficient to show an express easement in the 1878 Irvine deed. His theory is the reference to "appurtenances" in the *habendum* clause of the deed created an easement. We cannot agree.

To convey an estate or interest in land, an instrument must contain words of conveyance indicating a present intent to transfer an identified interest. "An instrument cannot be construed to be a deed, unless it contains operative words that are sufficient to manifest an intention to transfer title to an estate in the property described. A deed entirely lacking in words of grant passes no title. . . . No specific words need be used so long as they indicate an intention to pass title. . . ." (2 Patton & Palmor on Land Titles, § 343 (3d ed. 2003, fn. omitted).)

Under the statute of frauds, a deed must describe the interest being conveyed. Without a description, a deed is invalid. (See *Leoke v. County of San Bernardino* (1967) 249 Cal.App.2d 767, 772-772 [deed that described two mines but not a third did not convey the third].) Where the grant of an easement is claimed, the deed must describe both the use granted and the servient estate. (*City of Glendora v. Faus* (148 Cal.App. 2d 920, 926.)

Deeds are interpreted in the same manner as contracts. (Civ. Code, §§ 1053, 1066.) The primary objective is to ascertain and carry out the parties' intent. (See, e.g., *City of Manhattan Beach v. Superior Court* (1996) 13 Cal.4th 232, 238.)

We cannot find in the naked reference to appurtenances in the habendum clause either an intention to convey an easement or any description of one.[1] An easement is the right to use the land of another, so the inquiry must be whether the deed contains any language allowing Witte to use Irvine's surrounding land to reach his own. Nothing of the kind appears. The statement that the property was conveyed "with the appurtenances" appears to be traditional conveyancer's boilerplate to make sure that *existing* easements appurtenant to the estate granted were conveyed to the grantee. But Irvine did not have an existing easement benefiting the mine property to use other portions of his property for access, since one cannot possess an easement over his own land. So this catch-all language does not create an easement.

Edwards argues the Irvine deed describes an easement because a right-of-way easement may be appurtenant, and the mention of appurtenances in the deed creates such an easement. The argument borders on the frivolous.

The point relies on two statutory definitions. Civil Code section 662 provides something is appurtenant to land if "by right used with the land for its benefit." Civil Code section 801 states that "land burdens . . . may be attached to other land as . . . appurtenances, and are then

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[1] Historically, deeds contained several parts – premises, habendum and tenendum, reddendum, restrictions, and testimonium. The premises contained the names of the parties, words of grant, and a description of the property. (2 Patton & Palmor on Land Titles, § 334 (3d ed. 2003.) The habendum ("to have and to hold") stated the duration of the estate granted, at a time when naming the grantee did not convey a fee simple, and it described the purpose of the conveyance. (14 Powell on Real Property (1949), § 81A.04[1][d] at pp. 81A-53, 54.)

called easements." An ensuing list of 18 such easements includes a right-of-way.

That an easement may be appurtenant (as opposed to in gross, where it is personal to the owner) says nothing about whether one was created. And the argument proves too much. Easements appurtenant may be for many purposes. Some of those mentioned in Civil Code section 801, in addition to a right-of-way, are the right to pasture, fish, take game, take water or minerals, conduct sports, receive air, light or heat, the right to flood other land, and the right to natural support. If the boilerplate grant of appurtenances could create an easement, what easement is it? All possible uses of the grantor's retained land? Some? Which ones? It is against this unworkable result that we consider the rule that a deed is ineffective absent operative words of grant and a description of the interest granted. As we have said, no easement is mentioned or described in the Irvine deed.

Edwards also argues the Irvine deed describes the servient tenement in the recitation that it conveys "that certain portion of the Rancho Lomas de Santiago situate in Los Angeles County, California, and described as follows. . . . " His theory seems to be that the remainder of the Rancho Lomas de Santiago is the servient estate, and naming it suffices as a description of the servient estate. The point is meritless. The language in question describes the fee simple estate conveyed and nothing more. And since no easement was created, there can be no servient estate.

Edwards is equally mistaken in relying on *Camp Meeker Water System, Inc. v. Public Utilities Com.* (1990) 51 Cal.3d 845 for the proposition the words "rights appurtenant"

creates an easement. In *Camp Meeker*, a deed conveyed lands used for a water system, along with "'easements had, used, and enjoyed in the operation of said [s]ystem, and also all water and water rights appurtenant to said [s]ystem and used or useful in its operations.'" (*Id.* at p. 865.) The court held the deed included an easement appurtenant to the property conveyed, for the purpose of developing water sources on other lands of the grantor. (*Id.* at pp. 864-865.) Edwards' suggestion the operative language is "rights appurtenant" demonstrates that he misunderstands the case. Those are not the words that describe the right to take water. Rather, it is accomplished by the grant of "all water and water rights" "useful" in operation of the water system on the land conveyed, that creates the easement. And the present deed clearly lacks any comparable language.

Since we conclude no express easement was created, and Edwards does not argue the evidence shows an easement arose by necessity, implication, prescription or any other theory, the inescapable conclusion is that nonsuit was warranted.[2] Since the court granted a motion for judgment, we turn to whether that was prejudicial."

This modification does not effect a change in judgment.

---

[2] Because we conclude no easement was created, we do not consider Edwards' argument that an easement cannot be terminated by nonuse without proof of intent to abandon it, nor his contentions regarding the scope of the easement claimed.

The petition for rehearing is DENIED.

BEDSWORTH, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

MOORE, J.

SUPERIOR COURT FOR THE STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE

ANDREW C. EDWARDS TRUST DATED OCTOBER 22, 1999, and ANDREW C. EDWARDS, an individual, Plaintiffs, vs. THE IRVINE COMPANY, a Delaware corporation; ~~and DOES 1 through 100, inclusive~~, Defendant. AND RELATED CROSS-ACTION	Case No.: 02CC18992 [ASSIGNED FOR ALL PURPOSES TO JUDGE STEVEN PERK, DEPT. C27] **[~~SECOND PROPOSED~~] JUDGMENT BY COURT** (Filed Mar. 5, 2004)

This Court, pursuant to the parties' stipulation to trial by brief and direct testimony by declaration, took the matter under submission on December 19, 2003, following the filing of the trial brief and supporting written declarations by Plaintiffs ANDREW C. EDWARDS TRUST DATED OCTOBER 22, 1999, and ANDREW C. EDWARDS ("Plaintiffs"), the Motion for Judgment and Objections to Plaintiffs' Evidence by Defendant THE IRVINE COMPANY ("Defendant"), and Plaintiffs' opposition to Defendant's motion. Having considered said pleadings and other documents and records on file in this matter, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

Plaintiffs shall take nothing by way of the Complaint. No viable theory creating an easement over the property of

Defendant exists. Judgment is for Defendant. Plaintiffs and Defendant shall bear their own costs.

Dated: 3/5/04

STEVEN L. PERK
HON. STEVEN L. PERK
JUDGE OF THE
SUPERIOR COURT

Court of Appeal, Fourth Appellate District,
Division Three – No. G033700
S135952

IN THE SUPREME COURT OF CALIFORNIA

En Banc

(Filed Sep. 21, 2005)

ANDREW C. EDWARDS as Trustee etc.,
Plaintiffs and Appellants,

v.

THE IRVINE COMPANY, Defendant and Respondent.

Petition for review DENIED.

George, C.J., was absent and did not participate.

/s/ [Illegible]
Acting Chief Justice

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2 CIVIL NO: G033700
CASE NO: 02CC18992

COURT OF APPEAL – STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT,
DIVISION THREE

ANDREW C. EDWARDS TRUST
DATED OCTOBER 22, 1999,
and ANDREW C. EDWARDS, an individual,

Plaintiffs and Appellants,

vs.

THE IRVINE COMPANY, a Delaware corporation;
and DOES 1 through 100, inclusive,

Defendant and Respondent.

PETITION FOR REHEARING

On Appeal From The Judgment of the Superior Court
for the County of Orange
Honorable Steven Perk, Judge
Case No. 02CC18992

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OCTOBER 22, 1999
and ANDREW C. EDWARDS

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COURT OF APPEAL – STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

ANDREW C. EDWARDS TRUST DATED OCTOBER 22, 1999,
and ANDREW C. EDWARDS, an individual,

Plaintiffs and Appellants,

vs.

THE IRVINE COMPANY, a Delaware corporation;
and DOES 1 through 100, inclusive,

Defendant and Respondent.

PETITION FOR REHEARING

INTRODUCTION

This litigation arises out of a dispute between Plaintiffs/Appellants, ANDREW C. EDWARDS TRUST DATED OCTOBER 22, 1999, and ANDREW C. EDWARDS, an

individual ("Appellants"), and Defendant/Respondent, THE IRVINE COMPANY ("Respondents"), regarding Appellants' right to access Appellants' property ("The Black Star Coal Mine Property") through Respondent's property ("The Irvine Ranch").

During the course of litigating this case, Respondent moved for summary judgment/summary adjudication on the ground that "[Appellants'] predecessors-in-interest were never granted, or obtained from [Respondent], any easement to use its property" [CT61]. Respondent's Separate Statement of Undisputed Material Facts in Support of Respondent's Motion for Summary Judgment affirmatively asserted that it is undisputed that:

> "Mining operations at the Black Star Coal Mine commenced during **the latter part of 1877**." [CT79.]
>
> "**In August of 1878**, August Witte, Wm. Witte, B.F. Seibert and H.A. Barclay (collectively the 'Witte Partners') acquired from James Irvine their interest in **a parcel of land within the larger Irvine Ranch** and **within which** the Black Star Coal Mine is located (hereinafter the 'Property')." (Bold emphasis added.) [CT79-80.]

On November 13, 2003, the court issued its order denying Respondent's Motion for Summary Judgment/ Summary Adjudication [CT883]. In denying Respondent's Motion for Summary Judgment/Summary Adjudication, the court specifically determined, in pertinent part, that: "mining activities **were in progress at the time of the original grant** in 1878" and that "**the term 'appurtenance'** used in the 1878 conveyance potentially **includes an easement** (*Civil Code*, 662. *Civil Code*, 801) which most likely would have to be one by implied grant because

the exact location of the way is not known or at least has not been presented." (Emphasis added.) [CT883.]

Subsequent to the denial of Respondent's Motion for Summary Judgment/Summary Adjudication (at which time the court had an opportunity to see the nature and amount of evidence that would be presented at trial), the parties and the court agreed to modify the "order of proceedings" set forth in *Code of Civil Procedure* §§607 and 631.7 so that the evidence at trial would be presented, in the first instance, in writing using declarations, depositions and exhibits. This initial written presentation of evidence was to be followed by the submission of additional written evidence and the in-court examination of the adverse witnesses and experts, etc. (hereinafter "the stipulated order of proceedings").

As part of the stipulated order of proceedings, it was also agreed that Respondent would have "the option of moving for '**non-suit**' after the initial submission of Appellants' documentary evidence" (see detailed discussion below). However, after Appellants' initial submission of documentary evidence, Respondent filed a motion, the nature of which is still unclear (hereinafter "Respondent's Motion"). In any event, approximately 47 days after Respondent's Motion was taken under submission, the trial court issued its February 3, 2004 Minute Order which stated in full:

> "No appearances. The court having taken trial by brief and direct testimony by declaration under submission on December 19, 2003, now rules as follows: Judgment for Defendant. Plaintiff to take nothing by way of the Complaint. **No viable theory creating an easement over the property of Defendant exists.** Each side to

> bear their own costs. Defendant to prepare judgment, submit to opposing counsel for approval as to form and content, and to court for signature within ten days. Exhibits previously lodged with the court were returned to counsel for Plaintiff. Clerk to give notice. Entered: 2/3/04." (Emphasis added.)

Thereafter, Appellants timely appealed the trial court's judgment.

In this regard, and as discussed in detail below, the crux of Appellants' argument on appeal was that the motion procedure employed by the trial court not only violated the agreement between the court and the parties, it deprived Appellants of the ability to prove Appellants' case. However, numerous other issues were also raised.

On June 17, 2005, the Appellate Court's Opinion in this was case filed. **The Court of Appeal agreed with Appellants, that Respondent was limited to filing a Motion for Non-Suit**, and that the procedure employed by the trial court was improper. The Court of Appeal then went on to consider the remaining issues, **stating that those issues would be evaluated using the standards applicable to a Motion for Non-Suit** [see Appellate Court Opinion (hereinafter "ACO"), a true and correct copy of which is attached hereto as Exhibit "A" for the convenience of the Justices, at page 2, footnote 1, and page 9]. The Court of Appeal then went on to determine, among other things, that the procedure used by the trial court was not prejudicial to Appellants because "the express easement issue **turned solely on the wording of the Irvine Deed**, not declarations or deposition testimony . . . " [ACO, page 9], and that "no **intent to convey**

an easement appears in the Irvine Deed" [ACO, page 7] (emphasis added).

In particular, the Court of Appeal's opinion states:

> "Edwards argues the evidence is sufficient to show an express easement in the 1878 Irvine Deed. **His theory is the reference to appurtenaces in the habendum clause of the deed created an easement.** We cannot agree." [ACO, page 5.] (Emphasis added.)

As discussed in detail below, there was a tremendous amount of evidence presented to the trial court, and to the Court of Appeal. This evidence needed to be interpreted and viewed in light of numerous and complex legal theories, which few practitioners and courts ever consider at all, and which are certainly not dealt with on a daily basis. Certainly, under the circumstances of this case, any attorney, judge or justice could easily be confused as to the proper law to be employed and how that law is to be applied to the particular facts of the case. Appellants respectfully submit that as a result of these complexities, the Appellate Court made some mistakes of law, mistakes of fact and rendered a decision based upon issues which were not proposed or briefed by any party to the proceeding. As such, rehearing is required.

MEMORANDUM OF POINTS AND AUTHORITIES

1. APPELLANTS' PETITION FOR REHEARING MUST BE GRANTED BECAUSE THE ISSUE OF WHETHER OR NOT AN "INTENT TO CONVEY AN EASEMENT APPEARS IN THE IRVINE DEED" WAS NOT PROPOSED OR BRIEFED BY ANY PARTY TO THE PROCEEDING.

Government Code §6801 states that "rehearing **shall** be ordered upon timely petition of any party" if the Court of Appeal "renders a decision in a proceeding . . . based upon an issue which was not proposed or briefed by any party to the proceeding" (emphasis added). In this case, Appellants and Respondent vigorously debated whether or not Appellants were entitled to access the Black Star Coal Mine Property through Respondent's property by virtue of an "express" (or "implied") easement, with Respondent contending that "no such easement could exist because the 1878 Grant Deed: 1) failed to adequately describe the servient tenement; and 2) failed to adequately describe the use to which the servient tenement was to be subjected" (see, for example, Respondent's Brief at pages 17 and 18). Respondent's position in this regard was based upon the general rules of law stated in *City of Glendora v. Faus* (1957) 148 Cal.App.2d 920, 926, that a writing granting an easement must contain:

> "1. The names of the grantors and grantees;
>
> 2. An adequate description **of the servient tenement** that is sufficient for identification;
>
> 3. An adequate description of the use to which the servient tenement is to be subjected." (Also see Respondent's Brief at pages 17 and

18, and Miller & Starr, *California Real Estate 3d* (2004), at §15:14.)

Accordingly, throughout the course of this case, the parties extensively "proposed and briefed" the issues of: whether or not the 1878 Grant Deed adequately described the servient tenement and the rules of law applicable to determining the scope and location of easements including rules regarding floating easements, etc. (Respondent admitted that the names of the grantor and grantee are set forth in the 1878 Grant Deed).

However, neither party ever discussed the entirely separate issue (apparently raised sua sponte, and for the first time, in the Appellate Court's Opinion) of whether or not the 1878 Grant Deed "contains **words of grant indicating an intent to transfer** an estate or interest in land." In this regard, Appellants respectfully submit that the reason this issue was never discussed is because there is no rule of law requiring that the intention to convey an easement appear in a grant deed **separate and apart from the general granting language**.[1] As discussed in detail below, the reasons for this are several. First, the term "express easement" merely refers to an easement which the parties had an intention to create. (See *Restatement of Property 3d*: Servitudes at §2.1.) In this regard, while express easements are commonly set forth in some sort of deed, or other writing, this is not an absolute requirement. Rather, **"express easements" can be created in writing, orally or even by conduct** as long as the requirements of the statute of frauds are satisfied

[1] This conclusion is supported by the fact that the Appellate Court's Opinion does not set forth any legal authority in support of this position.

(see *Miller & Starr*, supra, at §15:14 and *Restatement of Property 3d*, supra, at §2.1).[2] **As such, it appears that the issue being raised by the Court of Appeal in its decision in this case, for the first time, is actually a statute of frauds/parol evidence issue.**

In this regard, the Court of Appeal's confusion regarding these admittedly complicated factual and legal issues is apparent from a close reading of pages 5-7 of the Court of Appeal's Opinion, which states:

> "Edwards argues the evidence is sufficient to show an express easement in the 1878 Irvine deed. **His theory is the reference to 'appurtenances' in the habendum clause of the deed created an easement.**[3] We cannot agree.

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[2] Similarly, an "implied easement" is an easement which is implied by law in situations where the intent of the parties cannot be shown, but because the easement existed before the transfer of the property, the law will imply that the easement was intended to continue subsequent to the transfer. Basically, the intent is inferred by law based upon the circumstances that existed at the time of the grant.

[3] Please note that, as discussed elsewhere in this Brief, that Appellants have never claimed that the existence of the word "appurtenances" **in the habendum clause** of the 1878 Grant Deed created an easement. Appellants do contend that the language conveying the Black Star Coal Mine Property to Appellants' predecessors in interest in the "granting clause" or "premises clause" in the 1878 Grant Deed "along with all tenements, hereditaments, and appurtenances" includes any easement rights that the parties intended to transfer at the time of the conveyance. This language also includes the conveyance of any structures on the property, any rights to water flowing through the property, or any other "benefit, incidental to the reasonable use and enjoyment of the property intended by the parties at the time the Black Star Coal Mine Property was conveyed in 1878. In this regard, please note that the word "appurtenance" simply means, in the context of real property transactions, anything that is annexed to, part of, and which passes as an incident to, property, this would include an outhouse, a barn, a

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To convey an estate or interest in land, an instrument must contain words of conveyance indicating a present intent to transfer an identified interest. 'An instrument cannot be construed to be a deed, unless it contains operative words that are sufficient to manifest an intention to transfer title to an estate in the property described. A deed entirely lacking in words of grant passes no title. . . . No specific words need be used to long as they indicate to pass title. . . .' (2 Patton & Palomar on Land Titles, §343 (3d ed. 2003, fn. omitted).)

Deeds are interpreted in the same manner as contracts (Civ. Code, §§ 1053, 1066.) **The primary object is to ascertain and carry out the parties' intent.** (See, e.g., City of Manhattan Beach v. Superior Court (1996) 13 Cal.4th 232, 238.)

We cannot find in the **naked reference to appurtenances** in the **habendum clause** any **intention to convey an easement**. An easement is the right to use the land of another, **so the inquiry must be whether the deed contains any language allowing Witte to use**

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garden, an orchard, a right of way or other easement (see, for example, *Black's Law Dictionary* and *Restatement Property 3d*, Servitudes, §1:1.5.). To clarify, it is Appellants' position that easement rights were expressly intended to be created upon conveyance of the Black Star Coal Mine Property, and that this intention is supported by the language granting "all rights appurtenant," and the lack of any language limiting Appellants' access rights. Of course, when the rule that any ambiguities in a deed are to be construed against the drafter (James Irvine), and the rule that limitations on transfers must be set forth with some level of specificity, the language in the granting clause of the 1878 Grant Deed is certainly more supportive of the existence of the easement rights claimed by Appellants, then the limitations proposed by Respondent.

Irvine's surrounding land to reach his own.[4] Nothing of the kind appears. The statement that the property was conveyed 'with the appurtenances' appears to be traditional conveyancer's boilerplate **to make sure that existing easements appurtenant to the estate granted were conveyed to the grantee. But Irvine did not have an existing easement benefiting the mine property to use other portions of his property for access, since on** [sic] **cannot possess an easement over his own land.** So the catch-all language does not create an easement.

Edwards appears to argue an easement was intended because a right-of-way easement may be appurtenant, and the mention of appurtenances in the deed creates such an easement. **The argument borders on frivolous.**[5]

The point relies on two statutory definitions. Civil Code section 662 provides something is appurtenant to land if 'by right used with land for its benefit.' Civil Code section 801 states that 'land burdens . . . may be attached to other land as . . . appurtenances, and are then called easements.' An ensuing list of 18 such easements includes a right-of-way.

That an easement may be appurtenant (as opposed to in gross, where it is personal to the owner) says nothing about whether one was created. And

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[4] This statement fails to acknowledge the huge body of law allowing for the use of extrinsic evidence to establish an easement and allowing for the creation of easements by conduct and orally.

[5] Please note that this argument was originally accepted by the trial court when it denied Respondent's Motion for Summary Judgment.

> the argument proves too much. Easements appurtenant may be for many purposes. Some of those mentioned in Civil Code section 801, in addition to a right-of-way, are the right to pasture, fish, take game, take water or minerals, conduct sports, receive air, light or heat, the right to floor [sic] other land, and the right to natural support. If the boilerplate grant of appurtenances could create an easement, what easement did the parties contemplate?[6] All possible uses of the grantor's retained land? Some? Which ones? It is against this unworkable result that **we consider the rule that a deed is ineffective absent operative words of grant indicating an intent to transfer an estate or interest in land**. As we have said, **no intent to convey an easement appears in the Irvine Deed**."

As the portion of the Appellate Court's Opinion set forth above makes clear, the Appellate Court's decision in this matter was based upon the Appellate Court's determination that "**no intent to convey** an easement appears in the Irvine Deed," based on "the rule that a deed is ineffective absent operative words of grant indicating an intent to transfer an estate or interest in land." While it is true that, to be effective, grant deeds generally must contain words of grant indicating an intent to transfer, this is not a requirement is not, strictly speaking, applicable to the creation of easements.[7] Rather, as even the

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[6] These matters are to be determined from the intent of the parties using extrinsic evidence. There is no rule that requires this to be contained in the Grant Deed.

[7] Also, it should be noted, that (as discussed below), there are many exceptions to the basic rules regarding the sufficiency of the granting language contained in deeds. In this regard, it is well-established law that, depending on the circumstances, the Court can

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Court of Appeal's decision acknowledges (at page 6), the question or whether or not an express easement is created is to be determined from the intention of the parties as expressed in their writings, agreements, representations and by their conduct. The question of whether or not particular evidence is admissible to establish this intent is typically governed by the parol evidence rule. And, the question of how much of this intention must be contained in a written document is governed by the law regarding the statute of frauds.

In this regard, **Respondent has never raised the statute of frauds as a defense** in this case, and this is a defense that is waived if not timely asserted (see *Miller & Starr*, §1:74). It would appear that the reason that the defense of the statute of frauds was never raised by Respondent is because to do so would have been futile. That is because it is well-established law that the statute of frauds is not applicable to fully executed agreements (see *Miller & Starr*, supra, at Section 1:75 et seq.). Also, there are so many exceptions to the statute of frauds that it is often said that the "exceptions are more extensive than the rule." Furthermore, it would appear that the deed at issue herein does in fact satisfy the requirements of the statute of frauds, which are quite minimal.

Therefore, Appellants respectfully submit that whether or "not the intent to convey an easement appears

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look outside of the "four corners" of the deed to determine whether or not the parties intended to transfer an estate or interest in land. Of course, the "statute of frauds" is the body of law governing the extent to which real estate transactions must be set forth in writing, and the "parol evidence rule" is the body of law governing what evidence is admissible to establish the intention of the parties.

in the Irvine Deed" is not really relevant to any of the matters at issue herein. In any case, Appellants have not had an opportunity to fully and completely brief this issue. As such, rehearing is required.

It should be noted with regard to the above, that the determination of whether or not the parties "intended to convey an easement" is to be made by ascertaining the intent of the parties. To determine the intent of the parties, the courts often look to the parties' conduct, before any dispute arose, to see if that conduct evidences the existence of an easement. In this regard, sufficient evidence to defeat a motion for nonsuit is recited in the Appellate Court's Opinion (at page 2), wherein the court acknowledges the fact that in 1887, there existed "good roads" to the Black Star Coal Mine and over which "10 tons of coal per day was being hauled out."

Also, Appellants would like to point out that the Court of Appeal has made both factual and legal errors in its discussion of the 1878 Grant Deed. In this regard, the Court of Appeal's decision states (at page 6), "We cannot find in the naked reference to appurtenances **in the habendum clause** any **intention to convey** an easement," or any other language which would indicate Irvine's intention to allow Witte to use Irvine's surrounding land to reach the Black Star Coal Mine Property. These statement [sic] contain factual and legal misstatements which support this Petition for Rehearing.

In this regard, the 1878 Grant Deed states, in pertinent part:

"THIS INDENTURE, MADE THE THIRTY FIRST DAY OF AUGUST, ONE THOUSAND

EIGHT HUNDRED SEVENTY EIGHT, BETWEEN JAMES IRVINE OF SAN FRANCISCO, PART [sic] OF THE FIRST PART, AND WM A. WITTE, AUGUST WITTE, B.F. SIEBERT AND H.A. BARCLAY OF THE SECOND PART, INDEPTH; THAT THE SAID PARTY OF THE FIRST PART FOR AND IN CONSIDERATION OF THE SUM OF THIRTY THREE HUNDRED SIXTY FIVE 20/100 ($3,365.20) DOLLARS OF THE UNITED STATES OF AMERICA, TO HIM IN HAND PAID BY THE SAID PARTIES OF THE SECOND PART, AT OR BEFORE THE ENSEALING AND DELIVERY OF THESE PRESENTS, THE RECEIPT WHEREOF IS HEREBY ACKNOWLEDGED, **HAS GRANTED, BARGAINED AND SOLD, CONVEYED AND CONFIRMED**, AND BY THESE PRESENTS **DOES GRANT**, BARGAIN AND SELL, CONVEY AND CONFIRM UNTO THE SAID PARTIES OF THE SECOND PART AND TO THEIR HEIRS AND ASSIGNS FOREVER ALL **THAT CERTAIN PORTION OF THE RANCHO LOMAS DE SANTIAGO** SITUATE IN LOS ANGELES COUNTY, STATE OF CALIFORNIA, AND DESCRIBED AS FOLLOWS. [Description of location omitted.] **TOGETHER WITH ALL AND SINGULAR THE TENEMENTS, HEREDITAMENTS AND APPURTENANCES, THEREUNDER BELONGING, OR IN ANYWISE APPURTAINING**, AND THE REVERSION AND REVERSIONS, REMAINDER AND REMAINDERS, RENTS, FARES AND PROFITS THEREOF, **AND ALSO ALL THE ESTATE, RIGHT, TITLE, INTERESTS, PROPERTY**, _____, CLAIM AND DEMAND WHATSOEVER, AS WELL IN LAW AS IN EQUITY OF THE SAID PARTY OF THE FIRST PART, OR IN OR TO THE ABOVE DESCRIBED PREMISES, AND

EVERY PART AND PARCEL THEREOF, WITH THE **APPURTENANCES** TO **HAVE AND TO HOLD,** ALL AND SINGULAR, THE ABOVE MENTIONED AND DESCRIBED PREMISES, **TOGETHER WITH THE APPURTENANCES,** UNTO THE SAID PARTIES OF THE SECOND PART, THEIR HEIRS AND APIGNS [sic] FOREVER.

IN WITNESS WHEREOF, THE SAID PARTY OF THE FIRST PART HAS HEREUNTO SET HIS HAND AND SEAL THE DAY AND YEAR FIRST ABOVE WRITTEN. SIGNED, SEALED AND DELIVERED. SIGNATURE: JAMES IRVINE." (Emphasis added.)

As set forth in the Court of Appeal's Opinion (at footnote 2, page 6), "historically, deeds contain several parts." All deeds must contain a "granting clause," which is often referred to as a "premises" clause. Optional parts of the deed include the "habendum clause," which is also often referred to as the "to have and to hold" clause. As can be seen from the language of the 1878 Grant Deed at issue herein, and set forth immediately above, the "habendum clause" is comprised solely and exclusively of the clause at the end of the deed commencing with the words "to have and to hold." While the habendum clause does contain the word "appurtenances" in it, **the intention to convey an easement would not appear in the "habendum clause."** Rather, as set forth in footnote 2 of the Appellate Court's Opinion, "the purpose of the habendum clause is to state the duration of the estate granted." Instead, to determine whether or not an intention to convey an easement set forth in the four corners of the 1878 Grant Deed, the Court should look to the "granting clause." In this regard, Appellants would also like to point out the comment in the Appellate Court's Opinion (at page 6) that:

> "The statement that the property was conveyed 'with appurtenances' appears to be traditional conveyancer's boilerplate **to make sure that *existing* easements appurtenant to the estate granted were conveyed to the grantee**. But **Irvine did not have an existing easement benefiting the mine property** to use other portions of his property for access, **since one cannot possess an easement over his own land**. So this catch-all language does not create an easement."

Of course, it is well-established law that in interpreting a deed, the Court is to give meaning to all of the words set forth therein. As such, rather than summarily dismissing numerous references to "appurtenances" in the 1878 Grant Deed as being meaningless, boilerplate surplusage, the Court is supposed to attempt to give meaning to those terms. In this regard, while the word "appurtenances" often refers to easement rights, the word "appurtenances" is not strictly synonymous with the word "easements." Rather, the term "appurtenances" refers to all of those things which are "incidental to property ownership or used with the land for its benefit" such as the "right to use the land adjoining the property for access" (see *Miller & Starr*, supra). These rights appurtenant are commonly referred to by the shorthand term as an "easement," but the meaning of the words is different depending upon how and where they are used. In the 1878 Grant Deed, the term "appurtenances" must, if the word is to be given any meaning at all, refer to those rights conveyed along with the property to allow for its reasonable use and enjoyment – which rights would include a right of any easement.

Also, the Appellate Court's Opinion states that "Edwards is equally mistaken in relying on *Camp Meeker*

Water System v. Public Utilities Commission (1990) 51 Cal.3d 845, for the proposition that the words "rights appurtenant" create an easement. The Court goes on to state that in the *Camp Meeker* case, the words of "grant" are "water and water rights," not the words "rights appurtenant."

However, Appellants do not rely on the *Camp Meeker Water System* case for the proposition that the words "rights appurtenant" express an intent to create an easement. **This is primarily because the issue of whether or not an intent to create an easement is stated in the 1878 Grant Deed has never been proposed or briefed by any party to this case.**

Rather, the purpose of Appellants' extensive citation to the California Supreme Court's 1990 decision in the *Camp Meeker Water System* case is to provide a somewhat current authority which comprehensively discusses the law governing express easements and **easements by implication** in general, and the determination of the "scope" of either an express (or an implied easement) when there is no document setting forth that information.

Appellants do not, and never have, contended that the *Camp Meeker* case stands for the proposition that the words "rights appurtenant," by themselves, create an easement. Rather, as set forth in the Appellate Court's decision in this matter, and in the *Camp Meeker* case, and in essentially every authority on the point, **the determination of whether an easement has been created is to be made by looking at the intention of the parties** including their writings, their words and their conduct. Then, if this evidence does not support a finding that the parties "expressly" intended to create an easement, the

next question is whether, from the circumstances surrounding the conveyance, should an easement "be implied."

In this regard, it should be noted, that the Appellate Court's Opinion in this case states, at pages 7 and 8, that "Edwards does not argue the evidence shows an easement arose by necessity, implication, prescription or any other theory, the inescapable conclusion is that nonsuit was warranted." This is also incorrect. As admitted in Respondent's Brief at pages 16-17, these issues have been raised, although not extensively argued (see discussion below). In fact, the *Camp Meeker* decision contains an extensive discussion of the rules regarding implied easements and the differences between implied easement and express easements.

In this regard, and as pointed out in the Appellate Court's Opinion (at page 4), the Irvine Company's only argument that no implied easement was based upon Respondent's claim that the element of "apparent and continuous use prior to severance of title" could not be satisfied. However, as stated in the Appellate Court's Opinion (at page 2) prior to Irvine's sale of the Black Star Coal Mine Property to Witte, "there was a good road leading to the mine from Santiago Canyon, and ten tons of coal per day were being hauled out."[6] As such, Appellants have a viable claim of express easement.

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[6] Actually, the evidence proffered by Appellants was much more extensive and detailed, and must be viewed in the light most favorable to Appellants. That evidence showed that, prior to 1878, Witte claimed ownership of the Black Star Coal Mine property and began mining operations on that property. At about the same time, James Irvine was purchasing the property now known as the Irvine Ranch, which

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2. BECAUSE THE ISSUE OF THE SUFFICIENCY OF APPELLANTS' OFFER OF PROOF IN CONNECTION WITH APPELLANTS' REQUEST TO REOPEN IN RESPONSE TO RESPONDENT'S MOTION FOR NON-SUIT WAS NOT PROPOSED OR BRIEFED BY ANY PARTY TO THE PROCEEDING, REHEARING IS REQUIRED.

In this regard, the Appellate Court's Opinion states, in pertinent part, commencing at page 9, as follows:

> "Without gainsaying the procedural differences between the two motions, allowing the motion for judgment was not prejudicial. The express easement issue turned solely on the wording of the Irvine deed, not declarations or deposition testimony, so the trial judge was not in a position to weigh the evidence. Moreover, our own review of the evidence under the nonsuit standard is a further bulwark against an improper weighing of the evidence.
>
> Nor was Edwards denied the right to reopen associated with a nonsuit motion. **That requires an offer of proof sufficient to cure the defects in the case.** Here, no additional proof was tendered to make up for the absence of words of

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surrounded the Black Star Coal Mine Property. A dispute arose between Witte and Irvine as to who actually owned the Black Star Coal Mine Property, with the dispute ultimately resolved by Witte's purchase of the Black Star Coal Mine Property from Irvine. Therefore, the statement that Appellants could not claim the existence of an implied easement because of a lack of apparent and continuous use prior to severance of title is incorrect. Also, the law in this regard does not require any period of "continuous use." Rather, there just must be enough use being made of the property to put everybody on notice of the existence of these. (See *Miller & Starr*, supra). Therefore, this issue cannot be determined by way of non-suit.

conveyance in the Irvine deed. And the offer on other issues was insufficient, since Edwards never described the evidence he sought to add or what defects it would cure. The only substantive offer concerned the Ulrich declaration: 'Plaintiff can also offer other witnesses . . . who can testify to the same matters as to which Mr. Ulrich is testifying to.' That falls short of the required description of the evidence proffered and explanation of how it would cure defects in the case (*Alpert v. Villa Romano Homeowners Assn., supra*, 81 Cal.App.4th 1320, 1337), so any right to reopen was waived.

Edwards also fails to demonstrate any prejudicial vagueness in the grounds set forth in the motion. He argues the motion did not present concise grounds for nonsuit, but without any discussion of what was asserted or how it was lacking. That fails to carry the appellant's burden to affirmatively demonstrate error. (*Jacques Interiors v. Petrak* (1987) 188 Cal.App.3d 1363, 1369.) So granting the unauthorized motion for judgment was harmless error, since the record supports the granting of the agreed upon motion for nonsuit." (Emphasis added.)

With regard to the above, the issue of whether or not Appellants' offer of proof in connection with Appellants' request to reopen in response to Respondent's Motion for Non-Suit was not "proposed or briefed by any party to the proceeding." Rather, this issue was raised by the Court of Appeal, sua sponte, for the first time on appeal. As such, rehearing is required. In this regard, Appellants would like to point out that the Court's analysis set forth above "puts the cart before the horse."

As set forth in Eisenberg, Horvitz and Weiner, *California Practice Guide*: Civil Appeals and Writs (TRG 2004), supra, the purpose of the requirements that the grounds for a motion for non-suit be set forth concisely and with specificity, and the rule that the Court of Appeal cannot consider issues which were not set forth in the motion for non-suit, is to alert the plaintiff of the deficiencies in the plaintiff's case and to give the plaintiff an opportunity to cure those deficiencies.

In this case, because no grounds were set forth in Respondent's Motion for Non-Suit because Respondent claimed to have made a Motion for Judgment. As a result, Respondent's Motion for Non-Suit did not specify any particular problems with the evidence presented by Appellants. Therefore, the Court never identified any problems with the evidence presented by Appellants, and Appellants had no ability to know what evidence Appellants needed to proffer to cure the defects in Appellants' case. Simply put, the "prejudice suffered by Appellants" as a result of the "vagueness in Respondent's Motion," and the vagueness in the Court's ruling on that Motion, was the complete inability of Appellants to identify what evidence Appellants needed to proffer to cure the defects in Appellants' case. In fact, under the circumstances of this case, the prejudice to Appellants was so severe that it literally resulted in depriving Appellants of due process.

In any event, because this issue was never proposed or briefed by any party to this proceeding, rehearing is required.

3. THERE WERE NUMEROUS MISTAKES OF LAW AND FACT IN THE APPELLATE COURT'S OPINION, REQUIRING REHEARING.

As set forth above, there were numerous mistakes of law and fact in the Appellate Court's Opinion, such that Appellants' Petition for Rehearing should be granted. Most of those matters have been discussed above. However, for the purpose of clarity, Appellants would like to point out the following.

First, as admitted in Respondent's Brief, and as stated in the Appellate Court's Opinion, the issues of implied easement, easement by necessity and balancing of hardships were raised by Appellants, although these issues have never been extensively discussed. The reason these issues were never extensively discussed is that, absent an understanding of what evidence was on the table, it was almost impossible to argue any of these theories with any specificity.

However, now that it has been determined that Respondent's Motion was in fact a Motion for Non-Suit, Appellants would like to again point out that Appellants submitted the Declaration of Appellants' Expert Engineer, Riley Clark. That Declaration, when viewed in the light most favorable to Appellants, establishes an easement by necessity.

Similarly, as discussed above, there were roads going through the Irvine Ranch Property to the Black Star Coal Mine Property prior to the conveyance of the Black Star Coal Mine Property. Therefore, facts sufficient to establish an implied easement exist.

Also, the facts proffered by Appellants support the granting of some kind of easement by way of balancing of hardships or estoppel. This would allow for the safe access to and from Appellants' property in the event of fire.

The bottom line is, as a result of the procedures employed by the trial court, Appellants never had a chance to present Appellants' case in a fair manner. Therefore, Appellants' Petition for Rehearing should be granted.

DATED: July 2, 2005 Respectfully submitted,

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 14(c)(1))

The text of this brief consists of 6,504 words as counted by the Corel WordPerfect version 8 word-processing program used to generate the brief.

DATED: July 2, 2005 Respectfully submitted,

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CASE NO. _____

In the
SUPREME COURT OF CALIFORNIA

ANDREW C. EDWARDS TRUST DATED
OCTOBER 22, 1999, and
ANDREW C. EDWARDS, an individual,

Plaintiffs/Appellants/Petitioners,

vs.

THE IRVINE COMPANY, a Delaware corporation;
and DOES 1 through 100, inclusive,

Defendant and Respondent.

PETITION FOR REVIEW

After a Decision by the Court of Appeal
Fourth Appellate District, Division Three
Case Number G033700
(Orange County Superior Court
Case Number 02CC18992)

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CASE NO. _____

In the
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ANDREW C. EDWARDS TRUST DATED OCTOBER 22, 1999, and ANDREW C. EDWARDS, an individual,

Plaintiffs/Appellants/Petitioners,

vs.

THE IRVINE COMPANY, a Delaware corporation; and DOES 1 through 100, inclusive,

Defendant and Respondent.

PETITION FOR REVIEW

TO THE HONORABLE CHIEF JUSTICE, RONALD M. GEORGE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

Plaintiffs/Appellants/Petitioners, ANDREW C. EDWARDS TRUST DATED OCTOBER 22, 1999, and ANDREW C. EDWARDS, an individual, respectfully petitions for review following the decision of the Court of Appeal, Fourth Appellate District, Division Three (per Bedsworth, J., Rylaarsdam, A.P.J., and Moore, J.), filed on June 17, 2005, and the order of that Court (per Bedsworth, J., Rylaarsdam, A.P.J., and Moore, J.), filed on July 18, 2005, modifying its decision and denying Petitioners' Petition for Rehearing. Attached hereto as Exhibit "A" is a "Redline" version of Appellate Court's opinion created by Petitioners, showing the modifications made by the Appellate Court in response to Petitioners' Petition for Rehearing. Actual copies of the opinion and order of the Court of Appeal are attached hereto as Exhibits "B" and "C," respectively. All page references in this Petition for Review to the Court of Appeal's opinion are to the "Redline" version of the Appellate Court's Opinion and will hereinafter sometimes be designated "RVACO."

ISSUES PRESENTED

1. Did the Appellate Court's Order Denying Rehearing violate the mandatory rehearing requirements of *Government Code* §68081?

2. Is it appropriate for the Court of Appeal to modify its opinion pretextually to avoid the mandatory rehearing requirements of *Government Code* §68081?

3. Was the trial court's consideration of Respondent's Motion for Nonsuit using the standards applicable to a Motion for Judgment prejudicial to Petitioners?

4. Were Petitioners required to provide a detailed offer of proof in opposition to Respondent's Motion for Nonsuit, when Respondent failed to set forth the grounds for the motion concisely and with specificity, and the trial court failed to rule on any objections to evidence? And if so, exactly how was this to be accomplished?

5. Did Petitioners raise the issues of easement by implication, easement by necessity, easement by prescription, balancing of hardships and estoppel?

6. Do the references to "appurtenances" in the 1878 Grant Deed have any meaning, or does Petitioners' assertion that the references to "appurtenances" includes incidental rights such as easements "border on the frivolous?"

7. What remedy is available to an appellant where the Court of Appeal renders a decision which is founded upon rules of law that do not exist, and where the court refers to cases which do not even stand for the rule of law proposed?

8. Does a plaintiff who is deprived of due process by the Court of Appeal have any remedy?

WHY REVIEW SHOULD BE GRANTED

This litigation arises out of a dispute between Plaintiffs/Appellants/Petitioners, Andrew C. Edwards, as Trustee of the Andrew C. Edwards Trust Dated October 22, 1999, and Andrew C. Edwards, an individual ("Petitioners"), and Defendant/Respondent, The Irvine Company ("Respondent"), regarding Petitioners' right to access Petitioners' property ("The Black Star Coal Mine Property," which will hereinafter sometimes be referred to as "Black Star") through Respondent's property ("The Irvine Ranch").

From a factual perspective, this case is extraordinarily interesting because the transactions at issue, for the most part, concern the circumstances surrounding the conveyance of Black Star to Petitioners' predecessors in interest by way of Grant Deed in 1878, and the events that occurred thereafter. Essentially, the "facts" at issue in this case tell the history of the rise and fall of a real "wild west" mining town, and even include an Indian massacre. In fact, most of the evidence presented in the trial court consisted of stories, maps, articles and other historic documentation. The designated expert witnesses included historians, etc.

From a legal perspective, this case is interesting because it involves the rather complex and sophisticated laws regarding the interpretation of deeds, the establishment of easements, and the various other interrelated legal concepts, all of which have confounded attorneys, judges and legal scholars for over one hundred years.

Possibly due to the complexity of the facts of this case, the complexity of the legal issues presented and the lack of time that seems to plague us all, neither the trial court nor the Court of Appeal fairly considered the matters presented

by this truly extraordinary case. In this regard, much of the Appellate Court's opinion is "based on issues that were not proposed or briefed by either party" and contains so many legal and factual errors that Petitioners believe that the Justices of the Court of Appeal will actually be embarrassed if they are given the opportunity to rehear this matter.

For example, the Court of Appeal's Opinion contains the statement:

> "Under the statute of frauds, a deed must describe the interest being conveyed. Without a description, a deed is invalid. (See *Leoke v. County of San Bernardino* (1967) 249 Cal.App.2d 767, 772-772 [deed that described two mines but not a third did not convey the third].)" (RVACO:6.)

However, a review of the court's decision in *Leoke*, supra,[1] reveals that **the court in that case never even**

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[1] On the other hand, ironically, the opinion in *Leoke v. County of San Bernardino*, supra, did state, at page 773, in pertinent part:

> "In interpreting a deed, consideration should be given to the instrument as a whole, with due regard to every word and clause in light of the circumstances surrounding its execution. Plaintiff would single out words 'mineral surveying no. 3992' and ignore the descriptive names of the mines and section number, a mine may be conveyed by its own name. The known names of the mines were a significant part of the description and cannot be ignored." (Emphasis added. Citations omitted.)

The above statement from *Leoke v. County of San Bernardino*, supra, specifically conflicts with the statement in the Court of Appeal's opinion in this case that the numerous references in the 1878 Grant Deed "that the property was conveyed 'with the appurtenances' appears to be traditional conveyancer's boiler plate" and should, therefore, be ignored, and that the reference to "Rancho Lomas de Santiago" and

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discussed the statute of frauds, whether a deed must describe the interest being conveyed, and the extent to which a deed, without a description, is invalid. While Petitioners have no idea where this erroneous legal citation came from, it is clear that it was not proposed by either of the parties.

Also, there is no simple rule of law that "a deed is invalid" "under the statute of frauds" if the deed does not "describe the interest being conveyed." This is because "there are so many exceptions to the statute of frauds that the exceptions have now eclipsed the rule." For example, the statute of frauds is not even applicable to "executed contracts." Of course, as set forth in the Court of Appeal's own statement of facts, the contract at issue herein was "executed" more than one hundred years ago. Therefore, the defense of the statute of frauds is not available.

Also, technically, a deed that does not comply with the requirements of the statute of frauds is "voidable," it is not "void" or "invalid," and the defense is waived if not timely asserted. In this case, Respondent never raised the issue of the statute of frauds as a defense. **In fact, the statute of frauds issue was never "proposed or briefed by any party." Rather, the statute of frauds issue was raised, for the first time, by the Court of Appeal.**[2]

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other language in the Deed was, as a matter of law, "insufficient to describe the servient estate" (RVACO:7).

[2] Also, it would appear that because the Court of Appeal violated *Government Code* §68081, the Court of Appeal also "lacked jurisdiction" as that term is used in *California Rules of Court*, Rule 28(b)(2) (although Petitioners are unaware of any law on this particular subject).

Furthermore, because the Court of Appeal's opinion in this case is based upon several issues "which were not proposed or briefed by any party to the proceedings," Petitioners' right to due process was also violated.

Another primary issue on appeal in this case regards the Court of Appeal's somewhat harsh statement:

> "Edwards appears to argue an easement was intended because a right-of-way easement may be appurtenant, and the mention of appurtenances in the deed creates such an easement. **The argument borders on the frivolous.**" (Emphasis added.) (RVACO:6.)

The Court of Appeal then goes on to state, without citing any law whatsoever, that the references in the 1878 Grant Deed to "appurtenances" are "boilerplate," and should be ignored. In this regard, the Court of Appeal's accusation that Petitioners' claim that the reference to "appurtenances" in the 1878 Grant Deed refers to easements, "borders on frivolous," not only shows a lack of the mutual respect that should exist between the bar and the judiciary, it is also in direct conflict with California law, including, for example, the California Supreme Court's opinion in *Rubio Canon Land and Water Association v. Everett* (1908) 154 Cal.29, at pages 32 and 33, and the numerous cases cited therein. Once again, the lack of proper consideration of the matters at issue herein by the Court of Appeal compels the conclusion that a rehearing is necessary, and that Petitioners were deprived of due process. Also, this Court should clarify the law in this regard.

Another issue presented by this Petition is whether or not it is appropriate for the Court of Appeal to modify its

opinions "pretextually" to avoid "the requirements imposed by *Government Code* §68081 that **before** a Court of Appeal renders a decision based upon an issue which was not proposed or briefed by any party to the proceedings, the Court shall afford the parties an opportunity to present their views on the matter through supplemental briefing." (See *Dieckmeyer v. Redevelopment Agency of the City of Huntington Beach* (2004) 18 Cal.Rptr.3d 871.)

Another important issue presented in this case arises out of the Appellate Court's statement that:

> "Since we conclude no express easement was created, **and Edwards does not argue the evidence shows an easement arose by necessity, implication, prescription or any other theory**, the inescapable conclusion is that nonsuit was warranted. Since the court granted a motion for judgment, we turn to whether that was prejudicial." (Emphasis added.)

With regard to the above, even Respondent's Brief on Appeal and Respondent's Opposition to Petitioners' Petition for Rehearing admits that the issues of implied easement, easement by necessity and balancing of hardships were raised by Petitioners, although the express easement issue was certainly the primary subject of the debate between Petitioners and Respondent. Similarly, and ironically, the most extensive discussion in the Appellate Court's opinion regards Petitioners' reference to the California Supreme Court's decision in *Camp Meeker Water System v. Public Utilities Commission* (1990) 51 Cal.3d 845. Of course, the *Camp Meeker* case is well known for its extensive and detailed discussion of the laws of "implied easements." The result being that Petitioners' Briefs, Respondent's Brief and the Appellate Court's

decision, combined, devote more than 10 pages to the discussion of the law of implied easements. As such, the issue of implied easement was "argued by Petitioners."

Similarly, Petitioners submitted an uncontradicted declaration of an expert engineer for the purposes of establishing easement by necessity. Also, Petitioners presented evidence supporting the creation of an easement by prescription and pursuant to the doctrines of "balancing of hardships" or "estoppel." Clearly, while these issues were not the primary focus of attention by either Petitioners or Respondent, these issues were properly raised. Rather, it appears that the Court of Appeal got sidetracked in its consideration of matters which were not proposed or briefed by any party, and missed the fact that these issues were raised.

Another important issue presented in this case is the Court of Appeal's determination that the trial court's granting of Respondent's Motion for Nonsuit was "non-prejudicial." In this regard, and as set forth in detail below, this case was tried to the trial court using a stipulated procedure for the submission of evidence. As part of that procedure, it was agreed that Respondent could only bring a Motion for Non-suit. However, instead of bringing a Motion for Nonsuit, Respondent brought a Motion for Judgment. Over Petitioners' objections, the trial court granted Respondent's Motion for Judgment, and denied Petitioners the procedural advantages for which Petitioners bargained.

While the Court of Appeal did agree that Respondent was limited to bringing a Motion for Nonsuit, the Court of Appeal found that the granting of the Motion for Judgment was not prejudicial, even though Petitioners lost

substantial procedural rights. The Court of Appeal's opinion in this regard was based on the Court of Appeal's conclusion that "Edwards never described the evidence he sought to add or what defects it would cure in Edwards' request to reopen" (RVACO:8). **In this regard, please note that the issue of whether or not Petitioners' offer of proof in connection with Petitioners' request to reopen in response to Respondent's Motion for Nonsuit was not "proposed or briefed by any party to the proceeding."** Rather, once again, the issue was raised by the Court of Appeal, sua sponte, for the first time on appeal. As such, rehearing was requested in Petitioners' Petition for Rehearing. However, this issue was not dealt with at all by the Court of Appeal in its Order Modifying Opinion and Denial of Petition for Rehearing. As such, this Court must order this case back to the Court of Appeal for rehearing.

Also, the Court of Appeal's conclusion that Petitioner "waived any right to reopen" by failing to provide a sufficient "offer of proof" to the trial court makes no sense because, under the circumstances, it was impossible for Petitioners to know what evidence needed to be presented.

BACKGROUND

The "background" discussion set forth below includes quotations from the Appellate Court's decision in this case. While the Appellate Court's Statement of Facts is not accurate in all respects, it is the actual foundation for the Appellate Court's decision. As such, Petitioners believe that it will be more efficient to point out the problems with the Appellate Court's factual and legal analysis if the Appellate Court's factual statement is used to set forth the

"Background" information. The decision of the Court of Appeal in this case states, in pertinent part, commencing at page 2:

> "In 2001, Edwards acquired the former Black Star Coal Mine property in the Santa Ana Mountains. [*Court's Footnote #1: "In light of Edwards' claim the pretrial order permitted only a motion for nonsuit, we consider the evidence under that standard. Accordingly, we view the evidence, and all legitimate inferences from it, most favorably to Edwards. (CC-California Plaza Associates v. Paller & Goldstein (1996) 51 Cal.App.4th 1042, 1050.)*] It is surrounded on three sides by lands of The Irvine Company and on the fourth by the Cleveland National Forest. The property is accessible via Black Star Canyon Road, a county road that is no longer maintained and is open only to owners and occupiers of adjacent land. However, access from Black Star Canyon Road is limited to a small portion of the property (the lower portion) that is cut off from the remainder of the parcel due to steep terrain. Edwards claims a more convenient easement over an old mining road that traverses The Irvine Company's property.[3] It leads to the former mine site on a

[3] This is not entirely accurate. In this regard, the evidence submitted to the trial court included assessor's maps that show that the Black Star Coal Mine Property is actually comprised of two separate parcels which have been referred to, descriptively, by the parties as the "upper portion" and "lower portion" of the Black Star Coal Mine Property. The division of the properties was not the result of coincidence, it was a result of the terrain – the reason Black Star Canyon Road passes through the Black Star Coal Mine Property at the point it does is because of the steep terrain. In fact, the Black Star Canyon Road divides the upper portion and the lower portion of the Black Star Coal Mine Property. The point being that Petitioners do not merely claim a "**more convenient** easement over an old mining road that

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part of the property (the upper portion) that is suitable for building a home. Hence, this action.

The Black Star Coal Mine dates to 1877, when one August Witte discovered coal deposits and filed a possessory mining claim. According to articles in the Anaheim Gazette **in October and November, 1877, there was a good road leading to the mine from Santiago Canyon, and ten tons of coal per day were being hauled out**. By that time, James Irvine had assembled a large ranch in the area that included the mine site.

In 1878, Witte and others (collectively referred to here as Witte) acquired title to the mine property from Irvine. The deed recites that Irvine, as party of the first part, 'does **grant**, bargain and sell, convey and confirm unto the said parties of the second part and to their heirs and assigns forever . . . that certain portion of the Ranch Lomas de Santiago situate in Los Angeles County, State of California, and described as follows [a meets and bounds description follows]. . . . [¶] **Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appurtaining** . . . and also all the estate, right, title, interest . . . of the said party of the first part of in or to the above described premises, and every part and parcel thereof **with the appurtenances**. To **have and to hold**, all and singular, the above mentioned and described premises

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traverses the Irvine Company's property" to access the upper portion of the Black Star Coal Mine Property – as stated in the declaration testimony of Petitioners' expert engineer, Riley Clark, there is no other way to reach the upper portion of the Black Star Coal Mine Property.

together with the appurtenances, unto the said parties of the second part, their heirs and assigns **forever**.'

In 1879, Witte conveyed the property to the Black Star Coal Mining Company. It passed by mesne conveyances in 1926 to Myers Electrical Supply Company. Sometime in the late 1920's or 1930, Black Star Canyon Road was constructed. After further intervening conveyances, **the property was purchased in 1954 by Donald and Gladys Ulrich**. They later transferred the property to a family trust. In 2001, Edwards purchased the property from the Ulrich trust.

Dean Ulrich, son of the former owners, submitted a declaration saying his family typically had reached the upper portion of the property by crossing The Irvine Company land over the old mining road and a smaller path he described as a trail. Maintenance on the mining road was irregular. When it was maintained, the Ulrichs were able to drive to the upper property; otherwise they had to make the journey on foot. Although The Irvine Company fenced the mining road, Ulrich and his family always believed they had a right to use it for access. Several years ago, Ulrich had the road cleared and used it a few times a year to visit the upper property. Once, a guard stopped Ulrich and said he was trespassing. **He responded that his family had used the road since they bought the property, and he apparently went on his way unhindered. In a later meeting, representatives of The Irvine Company told Ulrich he could not use the road without an entry permit and demanded he sign certain unnamed documents. Ulrich refused and continued to use the road as before.**

The complaint sets out four causes of action. The first is to quiet title to an easement on several theories. **The primary claim is an express right-of-way easement** in the Irvine deed, which plaintiff interprets to allow access for all reasonable purposes, including normal development. **Alternative claims** are an **easement by implication, necessity, prescription, estoppel, and numerous other doctrines**. The remaining causes of action are for declaratory relief (an easement exists), an injunction to prevent interference with the easement, and damages for trespass upon the easement.

A December 1, 2003 minute order states 'court and counsel conferred in chambers regarding stipulation to trial by brief and direct testimony. . . .' It goes on to set a briefing and motion schedule: Plaintiff's trial brief by December 10, 2003, defendants 'motion for non-suit (or trial brief)' by December 17, 2003, and plaintiff's opposition by December 19, 2003. The order states that five days after notice of ruling 'on defendant's motion for nonsuit,' defendant's trial brief will be due. **Two days after that, 'the parties need to elect to call expert witnesses.'**

Edwards filed an 'initial statement of facts and evidence' indicating what he intended to prove. It was accompanied by supporting documentary evidence, declarations, and deposition excerpts. The relevant portions are as set out above.

The Irvine Company responded with a motion for judgment (Code Civ. Proc., § 631.8) and extensive objections to the proffered evidence. **The motion argued** the 1878 Irvine deed did not create an express easement, and Edwards

had not offered **admissible evidence** of an easement by **any other theory**. Alternatively, if the evidence was admissible, The Irvine Company argued any **easement by necessity expired** when Black Star Canyon Road provided alternate access, there **was no implied easement because one of the elements could not be satisfied (apparent and continuous use prior to severance of title)**, and a **prescriptive easement failed for lack of adverse and hostile use by the Ulrichs.**

Edwards' reply objected that the motion for judgment violated the pretrial order, which authorized only a motion for nonsuit (Code Civ. Proc., § 581c), and he also argued there were no grounds for a nonsuit because the evidence was sufficient to show he had an express easement. If the court did grant a nonsuit, he requested leave to reopen. Edwards stated he could submit additional evidence to cure The Irvine Company's various evidentiary objections, but he did not describe the evidence. Edwards also said he could offer other witnesses who could testify to the same matters as Ulrich, but again the evidence was not set out.[4]

In a February 3, 2004 minute order, the trial judge granted the motion. He said **no viable theory for an easement was shown, without further explanation**. There was **no ruling on**

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[4] Please note that Petitioners' offer of proof in connection with Petitioners' request to reopen was somewhat more substantial than indicated by the Appellate Court's opinion, and is discussed in more detail below. Also, as set forth in the Appellate Court's Statement of Facts, at the time Respondent's Motion for Judgment was granted, the parties still had the right to call expert witnesses, etc.

> **the evidentiary objections**. On February 17, 2004, Edwards filed a request for a statement of decision. In denying the request, the judge said the evidentiary portion of the trial lasted less than one court day and no statement of decision was requested when the matter was submitted. He added the request was also untimely for having been made more than 10 days after the ruling was issued." (Bold emphasis added.)

Please note that, as indicated above, in the course of preparing for trial, the parties and the court agreed to modify the "order of proceedings" set forth in *Code of Civil Procedure* §§607 and 631.7 so that the evidence at trial would be presented, in the first instance, in writing using declarations, depositions and exhibits. This initial written presentation of evidence was to be followed by the submission of additional written evidence and the in-court examination of the adverse witnesses and experts, etc. (hereinafter "the stipulated order of proceedings"). As part of the stipulated order of proceedings, it was also agreed that Respondent would have "the option of moving for **'non-suit'** after the initial submission of Petitioners' documentary evidence" (see detailed discussion below). However, after Petitioners' initial submission of documentary evidence, Respondent filed a motion, the nature of which is still unclear (hereinafter "Respondent's Motion"). In any event, approximately 47 days after Respondent's Motion was taken under submission, the trial court issued its February 3, 2004 Minute Order which stated in full:

> "No appearances. The court having taken trial by brief and direct testimony by declaration under submission on December 19, 2003, now rules as follows: Judgment for Defendant. Plaintiff to take nothing by way of the Complaint. **No**

> **viable theory creating an easement over the property of Defendant exists.** Each side to bear their own costs. Defendant to prepare judgment, submit to opposing counsel for approval as to form and content, and to court for signature within ten days. Exhibits previously lodged with the court were returned to counsel for Plaintiff. Clerk to give notice. Entered: 2/3/04." (Emphasis added.)

Thereafter, Petitioners timely appealed the trial court's judgment.

In this regard, and as discussed in detail below, the crux of Petitioners' argument on appeal was that the motion procedure employed by the trial court not only violated the agreement between the court and the parties, it deprived Petitioners of the ability to prove Petitioners' case. However, numerous other issues were also raised.

The Court of Appeal agreed with Petitioners, that Respondent was limited to filing a Motion for Non-Suit, and that the procedure employed by the trial court was improper. The Court of Appeal then went on to consider the remaining issues, **stating that those issues would be evaluated using the standards applicable to a Motion for Non-Suit** (RVACO:2[FN1]&9). The Court of Appeal then went on to determine, among other things, that the procedure used by the trial court was not prejudicial to Petitioners.

1. THIS PETITION FOR REVIEW SHOULD BE GRANTED BECAUSE THE COURT OF APPEAL'S OPINION WAS BASED ON ISSUES THAT WERE NOT PROPOSED OR BRIEFED BY ANY PARTY TO THE PROCEEDING.

As set forth above, in response to Petitioners' Petition for Rehearing, the Court of Appeal ordered the modification of its original opinion and denied Petitioners' Petition for Rehearing. However, given the cursory nature of the modifications, combined with the fact that the law set forth in the modifications was wrong and not supported by the authority referred to, the modifications made by the Court of Appeal appear to be merely "pretextual" and for the purpose of preventing further review and rehearing of the matters at issue herein. While Petitioners' concerns in this regard may or may not be justified, it is important for the integrity of the judicial process that the Court does not perpetuate these concerns.

In this regard, the particularly troublesome is the Court of Appeal's accusation that, Petitioners' claim that the reference to "appurtenances" in the Grant Deed evidences an intent to grant an easement, "borders on the frivolous." In this regard, in *Rubio Canon Land and Water Association v. Everett* (1908) 154 Cal.29, the California Supreme Court considered a case that presented facts which are strikingly similar to those at issue herein. In *Rubio*, supra, plaintiff was the operator of a well and pumping plant. Plaintiff "**made an oral agreement**" with defendant's predecessor in interest for the purchase of a half acre of property that was located within a large parcel of property owned by defendant's predecessor in interest. "The effect of the agreement was that plaintiff would put a well on the half acre of property in question, and lay pipe

across the remainder of the property owned by defendant's predecessor in interest over to plaintiff's reservoir." "In pursuance of this agreement, plaintiff constructed the well, pumping plant and the pipeline at an expense of more than $12,000.00, **and [defendant's predecessor in interest] thereupon executed to it a deed conveying the half acre, together with 'appurtenances thereunto belonging or in anywise appertaining.' The deed did not otherwise describe the pipeline or right of way through the remainder of Lot 14.**" In determining whether or not an easement existed across defendant's property, the court in *Rubio*, supra, stated, in pertinent part:

> "Plaintiff had paid the full consideration agreed upon by putting the system in operation. It had a perfect equitable title to the land and to the easement appertaining thereto. **The deed was but the execution of the parol agreement.** It transferred the naked legal title invested in plaintiff the entire estate, legal and equitable, in the land, and in the easement which was, as the property then stood, an incident thereto. *Civil Code* §801. The transfer of the legal title to the principal thing transferred also the legal title to the easement as an incident thereto. *Civil Code* §1084. **This would be the case even if the deed had not expressly purported to convey the 'appurtenances' with the land."** (Emphasis added. Citations omitted.)

Clearly, at least at the turn of the century, the term "appurtenances" in a grant deed referred to a grant of easement rights. As such, the unsupported declaration in the Appellate Court's opinion in this case, that Petitioners' argument that the reference to "appurtenances" in the

Grant Deed refers to an easement "borders on the frivolous," appears to be contrary to well-established California law. In fact, there is so much authority on this point that it cannot be adequately addressed in the page confines of this Petition. The point being that the Court of Appeal is clearly wrong about one of the critical legal issues upon which its entire opinion is based.

Ir addition to the Court of Appeal's citation to legal authority which does not exist, and reference to rules of law which are not supported by any authority, the Court of Appeal in this case "really based its opinion upon issues that were not proposed or briefed by any party to the proceedings." In this regard, when the Court of Appeal modified its opinion in this case, it added various phrases throughout the opinion indicating that the Court also determined that the 1878 Grant Deed failed to adequately describe "the use granted." However, once again, the Court of Appeal was mistaken as to the applicable law. In this regard, it is also undisputed California law that an easement is a "incident to land (or appurtenance) and passes with it, unless expressly excepted by terms of conveyance." There is no absolute requirement that an easement must be referred to in the conveyance. (See, for example, *Lemosetux v. Farmin* (1932) 128 Cal.App. 195.)

More importantly, the Court of Appeal's imposition of the requirement that the "use granted" by an easement must be set forth in a deed misses the point. As stated in Miller & Starr, *California Real Estate 3d*, at §15:45, and in the many, many cases referred to therein, "**an easement may be created without a writing,**" but "because an easement is an interest in real property within the statute of frauds, ordinarily easements are conveyed by an instrument in writing." "However, the courts have created

easements by estoppel, or on the basis of executed oral agreement, without a written deed of conveyance." While a discussion of the law in this regard would exceed the page limitations of this Petition, **what is clear is that the issue of the statute of frauds was never proposed or briefed by any party to this proceeding**. Also, as discussed in detail above, the reference to the *Leoke v. County of San Bernandino* case, and the Court of Appeal's opinion is misplace [sic] since there is no discussion in the *Leoke* case regarding the statute of frauds or the validity of deeds.

Also, the addition to the Court of Appeal's opinion that the reference to Rancho Lomas de Santiago in the Grant Deed does not describe the servient tenement is also contrary to California law. As discussed above, this is established by *Leoke*, supra.

With regard to the above, *Government Code* §68081 states that "rehearing **shall** be ordered upon timely petition of any party" if the Court of Appeal "renders a decision in a proceeding . . . based upon an issue which was not proposed or briefed by any party to the proceeding" (emphasis added). In this case, Petitioners and Respondent vigorously debated whether or not Petitioners were entitled to access the Black Star Coal Mine Property through Respondent's property by virtue of an "express" (or "implied") easement, with Respondent contending that "no such easement could exist because the 1878 Grant Deed: 1) failed to adequately describe the servient tenement; and 2) failed to adequately describe the use to which the servient tenement was to be subjected" (see, for example, Respondent's Brief at pages 17 and 18). Respondent's position in this regard was based upon the general rules of law stated in *City of Glendora v. Faus* (1957) 148 Cal.App.2d

920, 926, that a writing granting an easement must contain:

> "1. The names of the grantors and grantees;
>
> 2. An adequate description **of the servient tenement** that is sufficient for identification;
>
> 3. An adequate description of the use to which the servient tenement is to be subjected." (Also see Respondent's Brief at pages 17 and 18, and Miller & Starr, *California Real Estate 3d* (2004), at §15:14.)

Accordingly, throughout the course of this case, the parties extensively "proposed and briefed" the issues of: whether or not the 1878 Grant Deed adequately described the servient tenement and the rules of law applicable to determining the scope and location of easements including rules regarding floating easements, etc. (Respondent admitted that the names of the grantor and grantee are set forth in the 1878 Grant Deed).

However, neither party ever discussed the entirely separate issue (apparently raised sua sponte, and for the first time, in the Appellate Court's Opinion) of whether or not the 1878 Grant Deed contains "**words of grant and a description of the interest granted**" (RVACO:5). In this regard, Petitioners respectfully submit that the reason this issue was never discussed is because there is no rule of law requiring that the intention to convey an easement appear in a grant deed **separate and apart from the**

general granting language.[5] As discussed in detail below, the reasons for this are several. First, the term "express easement" merely refers to an easement which the parties had an intention to create. (See *Restatement of Property 3d*: Servitudes at §2.1.) As stated above, while express easements are commonly set forth in some sort of deed, or other writing, this is not an absolute requirement. Rather, **"express easements" can be created in writing, orally or even by conduct** as long as the requirements of the statute of frauds are satisfied (see *Miller & Starr*, supra, at §15:14 and *Restatement of Property 3d*, supra, at §2.1).[6] **As such, it appears that the issue being raised by the Court of Appeal in its decision in this case, for the first time, is actually a statute of frauds/parol evidence issue.**

In this regard, the Court of Appeal's confusion regarding these admittedly complicated factual and legal issues is apparent from a close reading of pages 5-7 of the Court of Appeal's Opinion, which states:

> "Edwards argues the evidence is sufficient to show an express easement in the 1878 Irvine deed. **His theory is the reference to 'appurtenances' in the habendum clause of the deed created an easement.** We cannot agree.

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[5] This conclusion is supported by the fact that the Appellate Court's Opinion does not set forth any legal authority in support of this position.

[6] Similarly, an "implied easement" is an easement which is implied by law in situations where the intent of the parties cannot be shown, but because the easement existed before the transfer of the property, the law will imply that the easement was intended to continue subsequent to the transfer. Basically, the intent is inferred by law based upon the circumstances that existed at the time of the grant.

To convey an estate or interest in land, an instrument must contain words of conveyance indicating a present intent to transfer an identified interest. 'An instrument cannot be construed to be a deed, unless it contains operative words that are sufficient to manifest an intention to transfer title to an estate in the property described. A deed entirely lacking in words of grant passes no title. . . . No specific words need be used to long as they indicate to pass title. . . .' (2 Patton & Palomar on Land Titles, §343 (3d ed. 2003, fn. omitted).)

Under the statute of frauds, a deed must describe the interest being conveyed. Without a description, a deed is invalid. (See *Leoke v. County of San Bernardino* (1967) 249 Cal.App.2d 767, 772-772 [deed that described two mines but not a third did not convey the third].) Where the grant of an easement is claimed, the deed must describe both the use granted and the servient estate. (*City of Glendora v. Faus* (148 Cal.App.2d 920, 926.)

Deeds are interpreted in the same manner as contracts (Civ. Code, §§ 1053, 1066.) **The primary object is to ascertain and carry out the parties' intent.** (See, e.g., *City of Manhattan Beach v. Superior Court* (1996) 13 Cal.4th 232, 238.)

We cannot find in the **naked reference to appurtenances** in the **habendum clause** either an **intention to convey an easement or any description of one**. An easement is the right to use the land of another, **so the inquiry must be whether the deed contains any**

language allowing Witte to use Irvine's surrounding land to reach his own.[7] Nothing of the kind appears. The statement that the property was conveyed 'with the appurtenances' appears to be traditional conveyancer's boilerplate **to make sure that existing easements appurtenant to the estate granted were conveyed to the grantee. But Irvine did not have an existing easement benefiting the mine property to use other portions of his property for access, since on** [sic] **cannot possess an easement over his own land.** So the catch-all language does not create an easement.

Edwards appears to argue an easement was intended because a right-of-way easement may be appurtenant, and the mention of appurtenances in the deed creates such an easement. **The argument borders on frivolous.**[8]

The point relies on two statutory definitions. Civil Code section 662 provides something is appurtenant to land if 'by right used with land for its benefit.' Civil Code section 801 states that 'land burdens . . . may be attached to other land as . . . appurtenances, and are then called easements.' An ensuing list of 18 such easements includes a right-of-way.

That an easement may be appurtenant (as opposed to in gross, where it is personal to the owner) says nothing about whether one was created. And

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[7] This statement fails to acknowledge the huge body of law allowing for the use of extrinsic evidence to establish an easement and allowing for the creation of easements by conduct and orally.

[8] Please note that this argument was originally accepted by the trial court when it denied Respondent's Motion for Summary Judgment.

the argument proves too much. Easements appurtenant may be for many purposes. Some of those mentioned in Civil Code section 801, in addition to a right-of-way, are the right to pasture, fish, take game, take water or minerals, conduct sports, receive air, light or heat, the right to floor other land, and the right to natural support. If the boilerplate grant of appurtenances could create an easement, what easement is it?[9] All possible uses of the grantor's retained land? Some? Which ones? It is against this unworkable result that **we consider the rule that a deed is ineffective absent operative words of grant and a description of the interest granted.** As we have said, **no easement is mentioned or described in the Irvine Deed**.

Edwards also argues the Irvine deed describes the servient tenement in the recitation that it conveys "that certain portion of the Rancho Lomas de Santiago situate in Los Angeles County, California, and described as follows. . . ." His theory seems to be that the remainder of the Rancho Lomas de Santiago is the servient estate, and naming it suffices as a description of the servient estate. The point is meritless. The language in question describes the fee simple estate conveyed and nothing more. And since no easement was created, there can be no servient estate." (RVACO:5-7.)

As the portion of the Appellate Court's Opinion set forth above makes clear, the Appellate Court's decision in

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[9] These matters are to be determined from the intent of the parties using extrinsic evidence. There is no rule that requires this to be contained in the Grant Deed.

this matter was based upon the Appellate Court's determination that "**no intent to convey** an easement appears in the Irvine Deed," based on "the rule that a deed is ineffective absent operative words of grant indicating an intent to transfer an estate or interest in land." While it is true that, to be effective, grant deeds generally must contain words of grant indicating an intent to transfer, this is not a requirement is not [sic], strictly speaking, applicable to the creation of easements. Rather, as even the Court of Appeal's decision acknowledges (at page 6), the question or whether or not an express easement is created is to be determined from the intention of the parties as expressed in their writings, agreements, representations and by their conduct. The question of whether or not particular evidence is admissible to establish this intent is typically governed by the parol evidence rule. And, the question of how much of this intention must be contained in a written document is governed by the law regarding the statute of frauds.

In this regard, **Respondent has never raised the statute of frauds as a defense** in this case, and this is a defense that is waived if not timely asserted (see *Miller & Starr*, §1:74). It would appear that the reason that the defense of the statute of frauds was never raised by Respondent is because to do so would have been futile. That is because it is well-established law that the statute of frauds is not applicable to fully executed agreements (see *Miller & Starr*, supra, at Section 1:75 et seq.). Also, there are so many exceptions to the statute of frauds that it is often said that the "exceptions are more extensive than the rule." Furthermore, it would appear that the deed at issue herein does in fact satisfy the requirements of the

statute of frauds, which are quite minimal. **In any case, this issue was not proposed or briefed by any party.**

It should be noted with regard to the above, that the determination of whether or not the parties "intended to convey an easement" is to be made by ascertaining the intent of the parties. To determine the intent of the parties, the courts often look to the parties' conduct, before any dispute arose, to see if that conduct evidences the existence of an easement. In this regard, sufficient evidence to defeat a motion for nonsuit is recited in the Appellate Court's Opinion (at page 2), wherein the court acknowledges the fact that in 1887, there existed "good roads" to the Black Star Coal Mine and over which "10 tons of coal per day was being hauled out."

Also, Petitioners would also like to point out the comment in the Appellate Court's Opinion (at page 6) that:

> "The statement that the property was conveyed 'with appurtenances' **appears to be traditional conveyancer's boilerplate to make sure that *existing* easements appurtenant to the estate granted were conveyed to the grantee**. But **Irvine did not have an existing easement benefiting the mine property** to use other portions of his property for access, **since one cannot possess an easement over his own land**. So this catch-all language does not create an easement."

Of course, it is well-established law that in interpreting a deed, the Court is to give meaning to all of the words set forth therein. As such, rather than summarily dismissing numerous references to "appurtenances" in the 1878 Grant Deed (in both the "granting clause" and in the "habendum clause") as being meaningless, "boilerplate"

surplusage, the Court was supposed to attempt to give meaning to those terms.

Also, the Appellate Court's Opinion states that "Edwards is equally mistaken in relying on *Camp Meeker Water System v. Public Utilities Commission* (1990) 51 Cal.3d 845, for the proposition that the words "rights appurtenant" create an easement. The Court goes on to state that in the *Camp Meeker* case, the words of "grant" are "water and water rights," not the words "rights appurtenant."

However, Petitioners do not rely on the *Camp Meeker Water System* case for the proposition that the words "rights appurtenant" express an intent to create an easement. **This is primarily because the issue of whether or not an intent to create an easement is stated in the 1878 Grant Deed has never been proposed or briefed by any party to this case.** (Instead, as discussed above, Petitioners rely upon cases like *Rubio*, supra, for this purpose.)

Rather, the purpose of Petitioners' extensive citation to the California Supreme Court's 1990 decision in the *Camp Meeker Water System* case is to provide a somewhat current authority which comprehensively discusses the law governing express easements and **easements by implication** in general, and the determination of the "scope" of either an express (or an implied easement) when there is no document setting forth that information.

Petitioners do not, and never have, contended that the *Camp Meeker* case stands for the proposition that the words "rights appurtenant," by themselves, create an easement. Rather, as set forth in the Appellate Court's decision in this matter, and in the *Camp Meeker* case, and

in essentially every authority on the point, **the determination of whether an easement has been created is to be made by looking at the intention of the parties** including their writings, their words and their conduct. Then, if this evidence does not support a finding that the parties "expressly" intended to create an easement, the next question is whether, from the circumstances surrounding the conveyance, should an easement "be implied."

In this regard, it should be noted, that the Appellate Court's Opinion in this case states, at pages 7 and 8, that **"Edwards does not argue the evidence shows an easement arose by necessity, implication, prescription or any other theory, the inescapable conclusion is that nonsuit was warranted."** This is also incorrect. As admitted in Respondent's Brief at pages 16-17, these issues have been raised, although not extensively argued (see discussion below). **In fact, the *Camp Meeker* decision contains an extensive discussion of the rules regarding implied easements and the differences between implied easement and express easements.**

In this regard, and as pointed out in the Appellate Court's Opinion (at page 4), the Irvine Company's only argument that no implied easement was based upon Respondent's claim that the element of "apparent and continuous use prior to severance of title" could not be satisfied. However, as stated in the Appellate Court's Opinion (at page 2) prior to Irvine's sale of the Black Star Coal Mine Property to Witte, "there was a good road leading to the mine from Santiago Canyon, and ten tons of coal per day were being hauled out." As such, Petitioners have a viable claim of express easement.

2. BECAUSE THE ISSUE OF THE SUFFICIENCY OF PETITIONERS' OFFER OF PROOF IN CONNECTION WITH PETITIONERS' REQUEST TO REOPEN IN RESPONSE TO RESPONDENT'S MOTION FOR NON-SUIT WAS NOT PROPOSED OR BRIEFED BY ANY PARTY TO THE PROCEEDING, REHEARING IS REQUIRED.

In this regard, the Appellate Court's Opinion states, in pertinent part, commencing at page 9, as follows:

> "Without gainsaying the procedural differences between the two motions, allowing the motion for judgment was not prejudicial. The express easement issue turned solely on the wording of the Irvine deed, not declarations or deposition testimony, so the trial judge was not in a position to weigh the evidence. Moreover, our own review of the evidence under the nonsuit standard is a further bulwark against an improper weighing of the evidence.
>
> Nor was Edwards denied the right to reopen associated with a nonsuit motion. **That requires an offer of proof sufficient to cure the defects in the case.** Here, no additional proof was tendered to make up for the absence of words of conveyance in the Irvine deed. And the offer on other issues was insufficient, since Edwards never described the evidence he sought to add or what defects it would cure. The only substantive offer concerned the Ulrich declaration: 'Plaintiff can also offer other witnesses . . . who can testify to the same matters as to which Mr. Ulrich is testifying to.' That falls short of the required description of the evidence proffered and explanation of how it would cure defects in the case (*Alpert v. Villa Romano Homeowners Assn., supra*,

81 Cal.App.4th 1320, 1337), so any right to reopen was waived.

Edwards also fails to demonstrate any prejudicial vagueness in the grounds set forth in the motion. He argues the motion did not present concise grounds for nonsuit, but without any discussion of what was asserted or how it was lacking. That fails to carry the appellant's burden to affirmatively demonstrate error. (*Jacques Interiors v. Petrak* (1987) 188 Cal.App.3d 1363, 1369.) So granting the unauthorized motion for judgment was harmless error, since the record supports the granting of the agreed upon motion for nonsuit." (RVACO:9-10.) (Emphasis added.)

With regard to the above, the issue of whether or not Petitioners' offer of proof in connection with Petitioners' request to reopen in response to Respondent's Motion for Non-Suit was not "proposed or briefed by any party to the proceeding." **Rather, this issue was raised by the Court of Appeal, sua sponte, for the first time on appeal.** As such, rehearing is required. In this regard, Petitioners would like to point out that the Court's analysis set forth above "puts the cart before the horse."

As set forth in Eisenberg, Horvitz and Weiner, *California Practice Guide*: Civil Appeals and Writs (TRG 2004), the purpose of the requirements that the grounds for a motion for non-suit be set forth concisely and with specificity, and the rule that the Court of Appeal cannot consider issues which were not set forth in the motion for non-suit, is to alert the plaintiff of the deficiencies in the plaintiff's case and to give the plaintiff an opportunity to cure those deficiencies.

In this case, because no grounds were set forth in Respondent's Motion for Non-Suit because Respondent claimed to have made a Motion for Judgment. As a result, Respondent's Motion for Non-Suit did not specify any particular problems with the evidence presented by Petitioners. Therefore, the Court never identified any problems with the evidence presented by Petitioners, and Petitioners had no ability to know what evidence needed to proffer to cure the defects in Petitioners' case. Simply put, the "prejudice suffered by Petitioners" as a result of the "vagueness in Respondent's Motion," and the vagueness in the Court's ruling on that Motion, was the complete inability of Petitioners to identify what evidence needed to proffer to cure the defects in Petitioners' case. In fact, under the circumstances of this case, the prejudice to Petitioners was so severe that it literally resulted in depriving Petitioners of due process.

In any event, because this issue was never proposed or briefed by any party to this proceeding, rehearing is required.

In addition to all of the above, for the purpose of clarity, Petitioners would like to point out the following.

First, as admitted in Respondent's Brief, and as stated in the Appellate Court's Opinion, the issues of implied easement, easement by necessity and balancing of hardships were raised by Petitioners, although these issues have never been extensively discussed. The reason these issues were never extensively discussed is that, absent an understanding of what evidence was on the table, it was almost impossible to argue any of these theories with any specificity.

However, now that it has been determined that Respondent's Motion was in fact a Motion for Non-Suit, Petitioners

would like to again point out that Petitioners submitted the Declaration of Petitioners' Expert Engineer, Riley Clark. That Declaration, when viewed in the light most favorable to Petitioners, establishes an easement by necessity.

Similarly, as discussed above, there were roads going through the Irvine Ranch Property to the Black Star Coal Mine Property prior to the conveyance of the Black Star Coal Mine Property. Therefore, facts sufficient to establish an implied easement exist.

Also, the facts proffered by support the granting of some kind of easement by way of balancing of hardships or estoppel. This would allow for the safe access to and from Petitioners' property in the event of fire.

Further, as recited in the Court of Appeal's own Statement of Facts, there exists evidence to establish an easement by prescription.

The bottom line is, as a result of the procedures employed by the trial court, Petitioners never had a chance to present Petitioners' case in a fair manner. Therefore, Petitioners' Petition for Rehearing should be granted.

DATED: July 27, 2005

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 14(c)(1))

The text of this brief consists of 8,367 words as counted by the Corel WordPerfect version 8 word-processing program used to generate this Petition.

DATED: July 27, 2005

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